



This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

- + *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.
- + *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.
- + *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.
- + *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

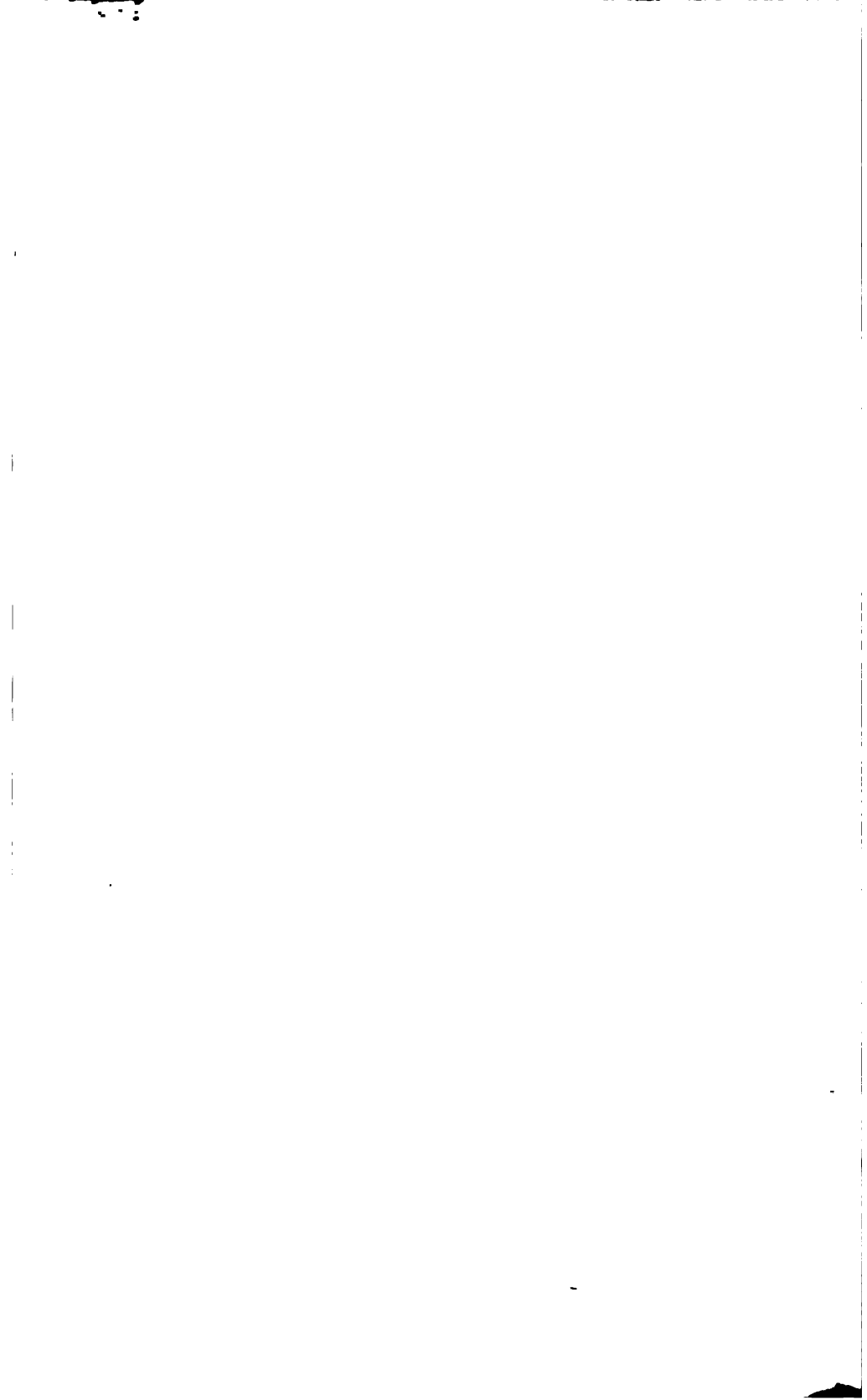
Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at <http://books.google.com/>



JSN
JAD
ZLT

v.2







Joseph Brereton
R E P O R T S
O F
C A S E S

IN THE REIGNS OF

Hen. VIII. Edw. VI. Q. Mary, and Q. Eliz.

TAKEN AND COLLECTED BY

Sir JAMES DYER, Knt.

SOME TIME

CHIEF JUSTICE OF THE COMMON PLEAS.

NOW FIRST TRANSLATED,

WITH ADDITIONAL REFERENCES TO THE LATEST
BOOKS OF AUTHORITY,

MARGINAL ABSTRACTS OF THE POINTS DETERMINED IN EACH CASE,

AND AN

ENTIRE NEW INDEX TO THE WHOLE,

BY

JOHN VAILLANT, M.A.

OF THE INNER TEMPLE, BARRISTER AT LAW.

To this EDITION a LIFE of the AUTHOR is prefixed;

AND

From an ORIGINAL MANUSCRIPT in the LIBRARY of the INNER
TEMPLE several NEW CASES of his are introduced in the NOTES.

P A R T II.

L O N D O N :

SOLD BY J. BUTTERWORTH, FLEET-STREET.

M DCC XCIV.

LELAND STANFORD JR. UNIVERSITY.

α.55473

JUL 9 1901

LIBRARY OF THE
LELAND STANFORD, JR., UNIVERSITY
LAW DEPARTMENT.

Ralph Haworth, Esq. and Lady Anna Powes his Wife, against John Herbert and his Wife.

(22) DOWER was demanded of a manor and land in the county of *Salop* of the gift of *Lord Powes*; to which it was pleaded, that the said *Anna*, in the life-time of the said *Lord Powes*, of her own accord, at *Bathnal Green* * in the county of *Middlesex*, left her said husband, and went away from him with one *Matthew Rocheley*, gent. to the parish of *Saint Clement Danes* without the new *Temple Bar*, *London*, &c. and afterwards there continued with the said *Matthew* in adultery during the life of the said *Lord Powes*, without this that she in the life-time, &c. was reconciled; and this, &c. To which the demandants reply, that after the departure aforesaid above supposed to have been made, the said *Lord Powes* in his life-time, willingly and without the coercion of the Church, reconciled himself at *London* in the parish and ward, &c. and permitted her to cohabit with him; and this, &c. * Rejoinder, that the said *Lord Powes* did not in his life-time voluntarily reconcile the said *Anne* in manner and form, &c. and upon that he put himself upon the country, &c. (23) And it was given in evidence at the trial in the *Guildhall* of *London* at *nisi prius* before *Lord Brook* to prove the reconciliation, that they lay together divers nights and in divers places after the departure and separation, and demeaned themselves as man and wife. And it was objected, that they never lived together in one house, but were apart, and the said wife continued in adultery with one or other during all the life-time of the said Lord; and *non allo-*

In dower, where issue is joined on reconciliation after elopement, the defendant cannot give in evidence any other elopement than that pleaded.

Fasch. ult. Rot. 628.

* [107. a.]

[3. P. Wms. 273.]

Register, 170. 43. E. 3.

19. 5. 47 E 3. 29. 25.

Perk. 70. 354. F. Dower,

72. 94. 110. 153. N. B.

150. K. W. 2. c. 34.

18. E. 4. 30.

[2. Inst. 436.]

Evidence, 3. E. 3. 23.

1. Rel. Abr. 680. 43.

E. 3. 19. b.

[Co. Lit. 32. a. and Mr. Harg. note (10) there.]

(22) In parliament, 30. Edw. 1. at *Westminster*, petition of *William Paynel* and *Margaret* his wife, &c. that the Lord the King would restore to them the third part of the manor which belongs to her of the freehold of *John Comyns*, her first husband, &c. and *Nicholas Warwick*, who sues for the King, pleads the elopement of the said wife from her husband with the said *William Paynel*; and upon this the said *W. P.* and *M.* produced a certain deed of the said *John Comyns* her first husband in these words: "To all be faithful in Christ, &c. *John Comyns* sendeth greeting: Know that I have delivered and committed of my free-will to the Lord *W. Paynel*, Knight, *Margaret* of *Comyns* my wife, and have also given and granted, and to the said *William* released and quit-claimed, all the goods and chattels which the said *M.* has, or hereafter may have, and also whatever belongs to me of the goods and chattels of the said *M.* with their appurtenances, so that neither I, or any other person in my name, can or ought to exact or claim the goods or chattels of the said *Margaret* with their appurtenances for ever; I will and grant, and by this presents confirm, that the said *M.* shall be and remain with the said Lord *William*, according to the will of the said *William*. In testimony whereof, &c. Witnessed, &c." And upon this he prays judgment; and it is considered that the said *W.* and *M.* take nothing by their petition, but be in mercy. This petition was commenced 28. E. 1. and continued until 29. E. 1. and adjudged 30. E. 1. See the record at large [2. Inst. 435. and see 12. Mod. 231.]

catur upon this plea and issue, for there may have been divers elopements and divers reconciliations, and the defendant ought to take issue on one at his peril.

Whether the plaintiff's entry after verdict and before judgment be a bar in debt for the damages on a judgment in assise? *qu.*

1. 9. 18. E. 4. 4. a.
12. b. 6. Dier, 32. 76.
1. H. 7. 12. 4. H. 6.
31. 21. H. 7. 4. b. 6.
El. 227. a.

(24) **I**N assise, the tenant pleaded *nul tort, &c.* and it was found for the plaintiff, and afterwards judgment given for him, and damages assessed at ten pounds; and the plaintiff sued his action of debt for the ten pounds, and declared upon this record, &c. and the defendant pleaded in bar, that after verdict given, and before judgment, the plaintiff entered upon the land: *Quare*, Whether this be a bar, or not?

(24) *Mich. 41. & 42. Eliz.* In *ejectione firmæ*, per Cur' holden, that entry after verdict shall not abate the writ, because the party has no day in court. [Cro. Eliz. 767. 2. Brownl. 231. 235.]

Vivion *against* St. Abyñ:

In trespass, the defendant conveying by several descents in tail, the plaintiff cannot convey by a feoffment from one of the mesne ancestors, and traverse his dying seised; but he ought (*protestando* to the rest) to plead the feoffment to be by the last ancestor, and traverse his dying seised. Plow. 140. a. Cro. Jac. 44. 9. H. 6. 22. a.

Post. 291. a.

* [107. b.]

[Winch, 13. Doct. Plac. 366. Com. Dig. Pleader, G. 10.]

[Bull. Ni. Pri. 93.]

19. 21. E. 4. 4. 3. 35.
H. 6. 35. Plow. 140. a.
4. 11. E. 4. 3. 10.

(25) **I**N trespass, the defendant conveyed title by one on whom the land was intailed by a fine in the time of Henry 6. and conveyed from the donee by five or six descents by each of them dying seised of the estate tail. And the plaintiff confessed the entail, and conveyed by a feoffment to himself from the heir of the donee, which was a discontinuance, and traversed the dying seised of the feoffor. And by the opinion of the Court this is not good, for he ought to traverse the very last descent, for otherwise it may be well intended that one of the same descendants came to the land, and died thereof seised, which is a remitter to the next heir; wherefore, &c. And at length, by the advice of the Court, the plaintiff confessing the entail, took all the dyings seised except the last by protestation, and for plea said, that the last ancestor * enfeoffed the plaintiff's ancestor, without this that the said last ancestor of the defendant died seised in manner and form, &c. and although this feoffment were not true, yet the defendant ought to maintain his first plea, and if it be a lie, he will be tricked. And see 20. E. 4. [3. pl. 15.] in a writ of entry *ubi ingressus non datur per legem, &c.* the pleading above was holden to be double when the entail is confessed, for then the answer, *s. ne dona pas*, does not make an end of all: wherefore, &c.

(26) **T**ENANT in tail (the reversion in fee to the king) makes a lease for a term of years reserving rent, and afterwards commits treason and is attainted, and by statute law the entailed lands are forfeited to the king; and afterwards the tenant in tail having issue dies: *Quare*, Whether the king can avoid the lease during the life of the issue?

Whether the king having the reversion may avoid a lease made by tenant in tail attainted of treason during the life of the issue? *qu.*
 Plö. 560. a. *Infra*, 115. a.
 Dy. 48, 49. 1. E. 6.
 B. N. C. 370. Co. 78.
 26. H. 8. c. 13. 5. &
 6. E. 6. c. 11. [Salk.
 338. 3. Bac. Ab. 316.
 and Mr. Hargrave's note
 (4) to Co. Lit. 18. a.]

Nudigate against The Earl of Derby and Others.

(27) **N**OTE, In assise in C. B. this Term between *Nudigate* and the *Earl of Derby* and others, the array was challenged for the Earl, because he was a peer of the realm having a seat and voice in parliament, and that the array was made by *A.* and *B.* late sheriff of *Middlesex*, no knight being named or returned upon the said panel, as ought to be in such case by the law of the land; and this, &c. And the plaintiff demurred in law to the challenge. And *T. 13. E. 3.* [*Fitz. Challenge*, 115.] in *quare impedit* against a bishop, was cited as an authority for this challenge, where the Book is ruled that for this reason the jury shall go without day: and see in attain 17. *E. 2.* [*Fitz. Attaint*, 69.] accordingly. And afterwards the Justices adjudged the challenge good, and a new panel to be made (which note for a good precedent in our days): And see 27. *H. 8.* fol. 27. [22. b. pl. 18.] accord', and the case of *T. 13. E. 3.* there cited; and it is said there, the challenge shall serve where a baron or lord of parliament is impleaded. *Quare*, if he be plaintiff, and will not challenge for this cause, Whether the defendant shall have it? And it should seem not. And see *M. 3. & 4. Eliz.* fol. [208. b. post.] for such a challenge in *London*; and *M. 7. & 8. Eliz.* fol. [246. b. pl. 70.] and *M. 14. & 15. Eliz.* [fol. 318. a. pl. 10. postea] a good case (*a*).

Where a peer is defendant, it is good cause of challenge that no knight is on the panel.
 Plö. 117. a. S. C. 7.
 El. 208. b. 6. Co. 54.
 Godb. 305.

2. Sid. 31.

B. N. C. 88. 221. 328.
 465. Stamf. 153. 1.
 Inst. 156. a.

27. H. 6. 22. b. 13.
 E. 3. Challenge, 105.
 Bro. Jurors, 48. 1. And.
 272. Dy. 144.

[21. Vin. Ab. 225.]

(a) But now by 24. *Geo. 2. c. 13. § 4.* no challenge shall be taken to any panel of jurors for want of a knight's being returned

in such panel, nor any array quashed by reason of any such challenge, any law, usage, or custom to the contrary notwithstanding.

Bishop of Chichester *against* Webb.

The archbishop of C. having franchise of the chattels of *felons de se* within his manors, commits treason; afterwards the queen grants all the chattels of *felons de se* in the kingdom to A. B. and then the archbishop is attainted: Whether A. B. shall not have a lease forfeited by a subsequent suicide within the manor?

[Jenk. cent. 5. c. 44. S. C.]

1. Co. 50. a. 9. Co. 25. Davis, 43. b. Britton, 15.

Dyer 77. a.

* [108. a.]

Fuller's Ch. Hist. lib. 5. p. 187. Post. 309. 76. Stamf. 187. b. 3. Inst. 19. Post. 289. a.

1. Co. 50. acc.

V. R. 582. 3.

40. E. 3. 47. 6. H. 7. 5. a. 21. E. 4. 46. b. 8. F. 1. 252. b. 19. H. 6. 62, 63. 30. H. 6. Grants, 53. Dier, 253. pl. 95. 52. 252.

(28) **T**HE *Archbishop of Canterbury* among other liberties and franchises had the chattels of *felons de se* within his manors, &c. and he made a lease for years to *Sir James Hales*, late Justice of C. B. which the Dean and Chapter confirmed, and then the Archbishop committed treason: and afterwards the Queen granted to the *Bishop of Chichester* her almoner, in augmentation of the Queen's alms, all and singular the goods and chattels of all * persons *felons de se*, and all deodands, within the kingdom of *England*, as well within liberties as without, found or to be found, forfeited or to be forfeited, which any way belonged or ought to belong to the said lady the Queen, from the time of the said grant, or from the sixth day of *July* then last past, or which from that time forwards for ever after (so long as the said Bishop should continue to be her almoner) should by any means belong or come to the said Lady the Queen. (29) And afterwards the Archbishop was attainted of treason at common law by his own confession, and also by act of parliament [1. *M. sess.* 2. c. 16.], and his possessions thereby forfeited during his life; and afterwards the said *Judge Hales* drowned himself in *Kent*, and so became *felon de se*. Now the question was asked among all the Judges, Whether the Almoner shall have this lease (of the value of one thousand marks or more), or not? And it was holden in the Exchequer Chamber by *BROOKE*, Chief Justice of C. B. *BROOKE*, Chief Baron of the Exchequer, *PORTMAN*, *BROWN*, *WHYDDON*, Justices, and *BARON SAXILBY*, and *GRIFFITH*, Attorney General, that the Almoner shall not have the lease, but that it shall be in the order and distribution of the Exchequer, among the possessions of the archbishoprick, because the power of granting it was not in the Queen at the time of the grant, because it was the Archbishop's, &c. (30) But *BROMELEY*, Chief Justice, *SAUNDERS*, *STAMFORD*, Justices, *BARON BROWN*, *JAMES DYER*, and *CORDEL*, Solicitor General, *à contra*; for the king may grant a thing which is not in him at the time of the grant, but which may come afterwards, as the wardship and marriage of the heir of his tenant, or the temporalities of a bishoprick when they shall fall in: but of an escheat when it shall happen, was wholly denied by *BAKER*;

yet

yet *quare* thereof. And note above, it would have been clear, if the Archbishop had been attainted of treason as above at the time of the grant, that the grant would have been good: and yet it is true, the fee-simple of the liberties and temporalities are not forfeited but for the natural life of the Archbishop; and the Queen shall have a freehold in them by reason of her crown, and not by reason of the temporalities: as if a man who has liberties as above, grant them to one for life, and the grantee be attainted of treason, the king shall have the forfeiture of them during the life *ratione coronæ*, and for the time they are rejoined to the crown; so in the other case. And note above, the grant was made between the commission of the treason and the attainder, which attainder has relation to the offence committed, therefore *quare* thereof; for this was not moved by the Judges.

Plow. 333.

6. E. 6. 77. a. Davis
Case de Customs, 7. E. 4.
11. a.Dier, 123, 124. 30. H. 8.
44. 1. Co. 50.3. Co. 25. b. Stamford,
18. b.39. H. 6. 34. a. 48. b.
21. E. 4. 46. b. contr.7. Co. 15. b. 3. Co. 29.
Davis, f. 47. b.[1. H. H. P. C. 413.
4. Bac. Ab. 198. Plow.
259, 260.]

Earl of Bedford *against* Smith.

(31) **N**OTE, That waste was assigned in pulling down one wooden wall, also in permitting one * brick wall to fall wholly down, and also in breaking up and destroying the plank floor and mangers of a certain stable, without saying *then affixed to the soil*; and for this cause it was holden no waste, The law is the same in the said two other cases above, inasmuch as it is not expressly alleged that the walls were coped † or covered, it is not waste: *accordant* 44. E. 3. [44. b. pl. 52.] and 22. H. 6. [24. b. pl. 45.] But *quare*, What shall be intended of a stone or brick wall?

* [108. b.]

In waste for pulling
down walls, they must
be alleged to be covered
in:So for destroying a man-
ger and plank-floor, *that*
they were fixed to the soil.[Co. Lit. 53. a. 5. Bac.
Ab. 463.]

Ante, 36. a.

Fit. 59. N. 40. Aff. 22.
10. H. 7. 2. b. 5. 8.
E. 3. 5. 2.

† In all the editions which I have seen | certainly got in by mistake.
there is the word *not* in this place, which

(32) **A**MAN was bound by covenant to release or discharge *A. B.* son and heir of one *J. B.* of the wardship and marriage of his body at the full age of twenty-one years, or before, at the request of the obligee. *Quare*, Which of them shall have election, if the request be made before full age? for it is a doubtful case. For suppose that I am bound in ten pounds to pay five pounds at the Feast of *Easter* next, &c. or before, at the request of the obligee, it

A man being bound to
release *A. B.* from ward-
ship at the age of twenty-
one years, or before,
on the request of the
obligee; *quare*, Who
shall have the election,
the request being made
before, &c.14. El. 312. b. 1. Rol.
Ab. 446. 18. E. 4. 21. a.
17. b. 28. H. 8. 18. a.

contr. [Co. Lit. 145. a.
2. Co. 36. b. 2. Mod.
201. 3. Lev. 137. Dougl.
14.]

seems that I have consented to give the election to the obligee; yet convert the sentence, and it seems I shall have the election; as to say, if I pay five pounds before the Feast of *Easter* at the request of the obligee, or at the Feast of *E. &c.* and then it seems that I have the election.

Rugway against Wolcot.

In trespass, defendant pleading that the plaintiff, a minor, by indenture and letter of attorney therein, enfeoffed the defendant's father, and afterwards by indenture confirmed: *he said tenement, &c. habendum, &c.* and descent to himself, it is bad: 1st, Because livery by letter of attorney of an infant is a disseisin. 2dly, Because the confirmation is pleaded of a tenement, &c. *habendum, &c.* when the land did not pass by the confirmation. 3dly, Because the defendant's father is not averred to be seised: Nor, 4thly, is plaintiff averred to have been of full age at the time of the confirmation. 5thly, Because there is no proof of either of the plaintiff's indentures,

Lit. 365.

4 Co. 9.

* [109. a.]

(33) **T**RESPASS by *Rugway* against *Wolcot* for breaking a close and house at *Exiland*. The defendant pleaded his father's dying seised and descent to himself in fee-simple, and gives colour to the plaintiff by the father. The plaintiff replies, that long before the trespass, and before the father of the defendant had any thing, &c. he, to wit, the said *Rugway* himself was seised in fee, and being so seised, by indenture made at *Exiland* aforesaid on the last day of *December 21. H. 8.* between the plaintiff and the said father of the defendant (one part of which said indenture sealed by the said father he shewed in court bearing the same date), gave and granted, and by the said indenture confirmed, to the said father the said tenements, to have to him and his heirs for ever, rendering therefore yearly to the said plaintiff, his heirs, and assigns, during the term of seventy-three years then next following, three shillings and fourpence; and after the said seventy-three years fully completed, rendering therefore yearly to the said plaintiff *Rugway*, his heirs, and assigns, four pounds at the four quarters of the year, s. at the Feast of the *Nativity of Our Lord*, of *Easter*, of the *Nativity of Saint John the Baptist*, and of *Saint Michael the Archangel*, to be paid in equal portions; and if it should happen that the said rent of three shillings and fourpence, or the said rent of four pounds, should be * in arrear and unpaid in part or in all by one whole year after any of the said Feasts on which, &c. being lawfully demanded, that then it should be well lawful to the said *Rugway, &c.* to re-enter and re-possess, the said indenture and seisin thereupon delivered in any wise notwithstanding, as by the said indenture, &c. (34) by virtue whereof the said father became seised in fee, and being so seised died seised, and it descended to the defendant as in the plea, &c. And because tenpence of the said rent for one quarter of a year ended at the Feast of *Saint Michael the Archangel*

Archangel in the year, &c. and for one whole year next after the said Feast, to the said plaintiff remained unpaid, the said plaintiff, as well at the said Feast of *Saint Michael the Archangel* in the year, &c. as on the 29th day of *September* in the year, &c. which was the last day of one whole year after, &c. came to the said tenements, and was there till the setting of the sun on the said 29th day, demanding the said tenpence so being in arrear to be paid to him, and that neither the said defendant or any other on his part was there and then ready to pay, &c. by reason whereof the said plaintiff afterwards and before the said trespass re-entered, &c. until the defendant committed the trespass, &c. (35) To which the defendant rejoined, that before the said last day of *December* in the 21st year the said plaintiff was seised of the said tenements in fee, and being so seised, by his indenture bearing date, &c. in the 14th year of *Henry 8.* enfeoffed the said father, &c. rendering rent as above in the other indenture, with a condition as above: and shewed further, that the said *Rugway* by the said indenture deputed and put in his place *A. B.* his attorney, to deliver seisin, &c. and that afterwards the said *A. B.* the attorney, in the 14th year of *H. 8.* delivered possession to the said father according to the form of the indenture, by virtue whereof the said father was seised in fee, the said *John Rugway* then being within the age of twenty-one years, to wit, of the age of eighteen years: and afterwards the said *Rugway*, by his said indenture bearing date the last day of *December* in the twenty-first year aforesaid, confirmed the said tenements with their appurtenants to the said *John Wolcot*, father, &c. to have to him and his heirs for ever, paying therefore as above, with a condition as above, and concluded," this indenture and seisin thereupon delivered notwithstanding;" and shews further the death of his father and the descent as above in bar; judgment, &c. And to this rejoinder *Rugway* demurred in law. (36) And as it seems the rejoinder is bad, for it does not confess and avoid the replication by matter in law or otherwise, nor traverse it; for *Rugway* has alleged in fact a feoffment by the indenture dated 21. *H. 8.* which can by no means be a confirmation, as is intended by *Wolcot* by the rejoinder; for it appears by *Wolcot*, * that at the time of the first indenture of feoffment, s. in the fourteenth year aforesaid, *Rugway* was within age, and livery of seisin was thereupon made by the attorney,

Dy. 68. b. 131. Plow
70. b. 166. 5. Co. 114.
Perk. § 836.

[1. Bac. Ab. 417.]

Dy. 117. Co. Lit. 52. b.
[and Mr. Harg. note
(4) there.]

Dy. 66. b.

* [109. b.]

Perk. 29. a. 2. Aff. 2.
9. 22. H. 6. 6. 3. 41.

E. 3. 9. 18. E. 4. 12.
26. H. 8. 2. 9. H. 7.
24. a.

[Shep. Touch. 213.]

19. H. 8. 9. 8. Co. 45.

[1. Wood's Cony. 534.
Hen. Black. 75.]

7. 10. H. 7. 3. 26.

3. 5. H. 7. 2. 13. Post.
217. a.

Lit. 519. Dyer, 269. b.

[Shep. Touch. 310,
311.]

Dyer, 139.

[Bul. N. Pr. 249, &c.]

which was a disseisin in law to *Rugway*, because the warrant of attorney was utterly void: and yet *Wolcot* pleads it as a feoffment, for he says that *Rugway* enfeoffed his father, &c. in the fourteenth year aforesaid, and the contrary appears by his own shewing, upon which there is no feoffment, but a disseisin, &c. (37) Also he ought to have shewn the first indenture in court, because the warrant of attorney is therein contained, &c. wherefore, &c. Also it is not averred in fact that his father was seised in fee of the land at the time of the confirmation made in the twenty-first year, and then the confirmation is clearly void, for it shall be taken strongest against the party pleading, s. that he had nothing at that time in the land. Also the confirmation is pleaded, "*confirmed the said tenement to the said John W. the father, to have and to hold the said tenement to him and his heirs, &c.*" so that by his pleading it shall be intended that the land passed by the confirmation, which cannot be in this case, unless it shall enure upon a privity by way of enlarging the estate; wherefore, &c. Also *quære*, Whether it can be well understood upon the rejoinder, that *Rugway*, at the time of the confirmation made, was of full age, or not? for it is not averred by matter in fact that he was of full age at that time, &c. Also the defendant ought to shew the counterpart of the indenture of confirmation sealed by *Rugway*, as I believe, &c. Afterwards by the judgment of the Court, without further argument either at bar or bench, the plaintiff recovered his damages, and a writ of inquiry was awarded, &c.

(37) *M. 44. & 45. Eliz. Moyl v. Ewer* [Noy, 49. Cro. Eliz. 905.], Note by *POPHAM* in evidence to a jury, and so it was resolved; A warrant of attorney may be contained in an indenture, although it was objected that no stranger can be party to an indenture, or any remainder be limited by it to a stranger; otherwise of a deed poll; but ruled as above. And *POPHAM* said, that he had seen many indentures where letters of attorney were included, and they were good. [Shep. Touch. 212.]

Whether an alienation in fee-farm by a bishop with confirmation, but without the king's licence, may be defeated by him as founder under stat. West. 2. c. 41. ? *qu.*
a. Co. 16. b. B. N. C. 277. 40. E. 3. 27. b. 45. E. 3. 19. 13. H. 7. 5.

(38) NOTE, It was moved among the Judges, Whether an alienation made in fee-farm by a bishop, with the confirmation of dean and chapter, without licence of the king, may be defeated by the king as founder by stat. *West. 2. c. 41. [13. E. 1.]* which gives the *contra formam collationis* to a common person, founder of an abbey, priory, hospital, or other religious house, without speaking expressly of

of a bishoprick. *Quære inde*, because it is a doubtful point; yet see the statutes of the chapters of *Litchfield* and *Wells* in the years 33. *H. 8.* [c. 30.] and 34. & 35. *H. 8.* [c. 15.] and as it seems by them, the *contra formam collationis* lies upon alienation of a bishoprick in fee-simple or fee-tail. And see also *H. 46. E. 3. Fitz.* in title *Forfeiture*, 18.

2. Inst. 457. Goldsb. 117.

[12. Co. 72. Fitz. N. B. 484, 485. and note (a) there.]

Bro. Alteration, 15. N. B. 211. b. Bro. contra Formam Collationis, 6. 38. E. 3. 30.

* Hilary Term,

1. and 2. Philip and Mary.

* [110. a.]

Dormer against Clarke.

(39) *NICHOLAS Clarke*, late husband to *Elizabeth Clarke*, the now defendant, was possessed of the farm of the manor of *Abbots-Aston*, in the county of *Bucks*, parcel of the possessions of the monastery of *Saint Albans*, by virtue of two several leases (one of them posterior to the other by several years) yet unexpired, made to *Sir John Clarke* his father by the abbot and convent of the said monastery; which *Sir J. C.* by will devised all his term and interest of and in the said, &c. to the said *N.* his son, who entered with the assent of the executors, &c. and being so possessed thereof, and being also possessed of a store or stock of fourteen hundred sheep and divers other chattels, the said *N.* by indenture in the 34th year of *H. 8.* reciting the said leases, demised and granted the said farm to *William Raynsford*, and all his estate, term, and interest in it, and both the indentures of the lease of it, to have and to hold to the said *W. R.* his executors and assigns for all the terms and years in the indentures. And also by another clause in the same indenture he granted the same store and stock to the said *W. R.* rendering and paying yearly to the said *Nicholas* and his assigns as well for the said farm as for the aforesaid store during the years in both leases (if the said *W. R.* his executors and assigns should so long occupy the premises by virtue of the said grant) the sum of fifty pounds at the Feasts of *St. Michael the Archangel* and the *Annunciation*, &c. by equal portions. And the said *W.* for himself, his executors,

Mich. Ult. Rot. 1363.

Where a surrender is pleaded, the agreement of the surrenderee thereunto must be averred.

If one party plead an assignment, and the other reply a surrender, he must traverse the assignment.

If a man seized in fee devise for life, the reversion cannot be pleaded to descend to his son, till after the entry of the particular tenent.

If the reversion of abbey lands be pleaded to be given to the king by virtue of stat. 31. *H. 8. c. 13.* without stating that they were previously surrendered, &c. it is bad.

Jones Rep. 185. Perk. 570. b. 7. 16. *H. 7. 5. 45. 5. 27. H. 6. 9. 21. E. 4. 29. Dy. 56. a. 212. b. Plow. 521. 525. Wentw. 39. Post. 139.*

9. *E. 4. 1. 5. Co. 17. Ante. 56.*

Perk. 693.

and administrators, promised and covenanted by the said indenture to and with the said *N.* that if it should happen that the said annual rent of fifty pounds should be in arrear in part or in all, &c. that then it should be lawful to the said *N.* and his assigns upon the aforesaid farm, and upon every parcel thereof, to enter and distrain, &c. (40) And in the said indenture is a proviso as follows, *s. Provided always, and it is covenanted and granted on the behalf of the said N. for himself and his executors, to and with the said W. R. and his executors, that if it shall happen the said N. to die within the term of years contained in the lease aforesaid, or that the estate of the said William, his executors, or assigns in the premises shall cease, or be determined at any time during the said term of years, that then immediately upon the same death or estate determined, as is aforesaid, the said William Raynesford, his executors, or assigns, shall have, * occupy, and enjoy the said stock of sheep, &c. by force of this present grant to his or their proper use, clearly discharged of payment of the said rent of fifty pounds and every part thereof against the said N. his heirs, or executors, any thing in these presents, &c. notwithstanding.*

* [110. b.]

12. H. 8. 17.

26. H. 8. .

13. H. 6. 22. 17. H. 7.

1. 1. Co. 46.

6. E. 4. 3.

(41) And afterwards the said *N.* died intestate, whereupon the said *Elizabeth* his wife had administration committed to her, &c. and for the rent arrear between the death and administration committed, the said *Elizabeth* distrained in the farm, and made avowry as administratrix, &c. and shewed all this matter in her avowry, except the said proviso, which was omitted, &c. and conveyed the farm and stock to the plaintiff from *W. R.* by a *que estate*; and averred that the said *W. R.* and his assigns continually have had, occupied, and enjoyed the said farm and stock by virtue of the said grant and lease, &c. and shewed no indenture except the counterpart of *Raynesford's* lease, &c. To this the plaintiff replied, that *Sir Robert Dormer* was seised in fee before the taking, and made a lease of it for five years to one *Stapleton*, who granted his term to the plaintiff; and shewed further a dying seised of the said *Sir Robert Dormer*, and the descent to his son, and so prayed aid of the son, who came in upon process and joined in aid. (42) And first they prayed oyer of the indenture between *N. C.* and *W. R.* and had it; and then they pleaded in bar to the avowry, *s. that king H. 8.*

See the reason of this case before, fol. 56. but without such a clause; if the tenant be evicted, he shall hold the sheep discharged, for the rent issued out of the land only.

was seised in fee, and granted it to the Earl of *Bedford*, who enfeoffed the said *Sir Robert Dormer* thereof; and he being seised in fee made his last will in writing and died, and by the said will he declared and devised the farm, &c. to the said plaintiff then his wife during her life, the reversion belonging to the said *William Dormer* his son and heir, of whom the aid was prayed; and they shewed further in fact, that the said *W. R.* gave, granted, and surrendered to the said *Sir R. D.* being seised in fee, &c. all his right, estate, title, interest, and term of years of and in the aforesaid farm, &c. without shewing any (a) writing thereof, and without shewing any agreement of the said *Sir Robert* to this surrender, &c. and so concluded in bar of the avowry. To this the defendant demurred in law; and because the bar was insufficient, the plaintiff by advice of his counsel was nonsuited.

2. H. 5. 1. 2. 7. 8. 10.
H. 6. 1. 16. a. 26. 5.
6. E. 4. 2. b. Plow,
608. B. N. C. 392.

[2. Salk. 618. 2. Vent,
199. 407. Cro. Car. 101.]

2. Rol. Rep. 20. 8,
H. 7. 9. b. Perk. 608,
Poph. 137.

(43) And afterwards, to wit, in *Michaelmas Term*, 2. & 3. *Ph. & M.* Rot. 1319, the plea aforesaid was again entered, and the same avowry made as before: and the defendant demanded oyer of the indenture, and it was entered in *hac verba*; and then she shewed that the said *Sir Robert Dormer* her late husband was seised of the entire manor aforesaid in his demesne as of fee, and by his last will and testament in writing (without shewing it to the court) devised * it to her for term of her life, and afterwards died, and she conveyed the fee-simple to his son as above, and prayed aid of him, who came in upon process, and by the same attorney, *s. Woodleefe*, who was also attorney for the said defendant, joined in aid. (And note this.) And they pleaded in bar to the avowry, and acknowledged the whole matter as in the avowry, and conveyed the reversion to king *Henry 8.* by virtue of the act of 31. *H. 8.* [c. 13.] and note this, because it is false, for the act does not give it, nor does it dissolve any monastery; wherefore, &c. And they also pleaded the attornment of *N. Clarke*, upon the grant of *Lord Russell*, patentee of the king, made to *Sir R. Dormer* on the 21st day of *October*, in the 33d year of *H. 8.* at which time the term of eight years above-mentioned was finished; and that afterwards, *s.* on the 30th day of *September*, in the said 33d year, the said *N.*

Plow. 141. 7. H. 6. 1.

* [111. a.]

2. H. 6. 1. 10. H. 6. 7.
21. E. 3. 12.

Plow. 193. b.

20. H. 6. 14.

(a) By 29. *Car.* 2. c. 3. § 3. no lease, &c. either of freehold or term of years, or any uncertain interest not being copyhold, shall be surrendered, unless it be by deed or note in writing signed by the party surrendering the same, or his agents, &c. or by act and operation of law. See *Gilb. Caf. in Eq.* 236. 2. *Wilf.* 27.

entered upon the premises by virtue of the legacy aforesaid made to him by his father (which is impossible in point of time; note this, &c.). (44.) And they also pleaded the devise of the manor to the said *Jane Dormer* for life by the said *Sir R. Dormer* her late husband *ut supra*, and alleged his death also; *after whose death the reversion of the said manor descended to the said William Dormer (of whom the aid was prayed) as son and heir, &c.* and that afterwards the said *Jane* entered by virtue of the said devise, and was seised thereof, &c. (And this is not true, because it was not a reversion before the entrance of the wife, &c. note this.) And they further alleged a surrender of the seite and premises in the 37th *H. 8.* by the said *W. R.* to the said *Sir R. Dormer*, who agreed thereto: and also on the same day a sale of the stock above, &c. and also shewed the death of *N. C.* and the rest as above, without taking any traverse that she is the assignee of *Raynesford*, as is alleged in the avowry. And to this bar the plaintiff demurred in law; but note, it was agreed between *GAWDY* and myself that no advantage should be taken of the omission of the traverse. And at length the parties agreed by the mediation of *LOWDEN* and *WESTON* of the *Middle Temple*; and *Mrs. Clarke* had two hundred and thirty pounds of *Lady Dormer*; but the opinion of the Court was, that the bar, in that it alleged the tenements to have come to the hands of the king by virtue of the act of 31. [*H. 8. c. 13.*] was insufficient and incurable.

22. E. 4. 37. 5. Co.
124. Plow. 423.

8. H. 7. 9. b.

[Plow. 193.]

Coward *against* Coward, Brothers, for Lands in Gillingham, in the County of Dorset.

Entry by tenant in tail.
[See 10. Vin. Ab. tit.
Estate, (1. b.) pl. 14.
and the note there.]
Co. Lit. 271.

Dyer, 23. 51. b. 77. b.
129. 139. 270.

* [111. b.]

(45) **H**USBAND and wife tenants in tail have issue two sons; the husband dies; the wife enfeoffs several persons in fee to the use of the wife for life without impeachment of waste, and after her decease that the feoffees and their heirs should stand and be seised to the use of the heirs of the body of her said late husband upon the said wife lawfully begotten, and for default of such issue, the remainder * over to *I. S.* in fee. And after the statute of Uses 27. *H. 8.* [c. 10.] s. in the 4th year of *Ed. 6.* the wife with a second husband and the youngest son levied a fine *sur cogni-*
zance

zance de droit come ceo, &c. to a stranger with warranty against the wife and her heirs, and he granted and rendered the land to the youngest son for the term of sixty years rendering rent, and granted the reversion and rent to the wife by the same fine, and to the heirs of her body, and of the body of her first husband lawfully begotten, remainder over in fee to the said *I. S.* whereupon the eldest son of the wife by her first husband entered, and then the wife died, and the youngest son claimed the lease: *Quere*, because it seems that the youngest had no title.

1. Co. 76. b. 174. b.
6. Co. 33, 21. E. 4. 30.

22. Aff. 37. 69. 3. Co.
62. a. B.N.C. 285. 382.

Warcope against Musgrave.

(46) **I**N debt on a bond made by *William Musgrave* the father of the defendant whose heir he is, the defendant pleaded *riens per descent* in fee simple, and the plaintiff averred assets, &c. The jury found at *nisi prius*, that *Edward Musgrave* grandfather of the defendant was seised in fee of divers manors in the county of *Westmoreland*, and named them in certain, and thereof enfeoffed one *Christopher Ward*, knight, and other feoffees, to have to them and their heirs for ever, to the use of the heirs of the body of the said *Edward* lawfully begotten, and that this feoffment was made by deed bearing date the 4th day of *August*, *A. D.* 1513. which was long before the statute of 27. H. 8. [c. 10.] and also that *Edward* died before the said statute, and that *William* the father, by virtue of the said statute and feoffment, entered into the aforesaid land, and held and occupied the same according to the force, form, and effect of the said feoffment, and died seised thereof; after whose death, the said land descended to the said defendant as son and heir, by force whereof he entered, and holds and occupies the same accor-

Whether lands given in fee to the use of the heirs of the body of the donor be assets by descent in fee-simple in the hands of his son and heir, after the statute of Uses?

Dyer, 124. 6. Co. 47.
3. Keble, 317.

6. Co. 42. Dyer, 375.

(45) **NOY**, of *Lincoln's Inn*, Mich. 19. Jac. at Moot in the Hall put this difference, that if a man make a feoffment in fee to the use of himself for life, the fee-simple remains in the feoffees, for otherwile he will not have an estate for life according to his intention; but if the use be limited to himself in tail, it is otherwile, for both estates may be in him. [Fearne Cont. Rem. 4th edit. 50.]

M. 34. & 35. *Eliz.* in the Court of Wards, in the argument of the *Earl of Bedford's Case* [2. And. 197. *Mor.* 718.] it was holden by *POPHAM* and *ANDERSON*, that if *A.* make a feoffment to the use of himself for forty years, and does not limit any other estate, the fee is in the feoffees.

M. 41. & 42. *Eliz.* this question was moved to the Court by *PENRUDDOCK*: A reversion on an estate-tail descends to the heir, who is sued in debt, &c. and he pleads *riens per descent*: Whether he can give this matter in evidence? And *PER CUR.* he may well enough. [Curb. 126. 2. Willf. 49. 2. Black. Rep. 1230.]

Bro. Affets per Descent,
12. Fets. 156. 43.E.3-9.

ding to the form and effect of the said feoffment; and they pray advice of the Court, Whether the premises be lands descended by hereditary right in fee simple, or not? and if they are, then they assels damages, &c. (a).

(a) An use at common law, or a trust, should not be assels till reduced into possession. *Co. Lit.* 374. b. But by 29. *Car.* 2. c. 3. §. 10. a *cessuy que trust* dying, if he leave a trust in fee to descend to his heir,

such trust shall be assels by descent: and the heir shall be chargeable with the obligation of his ancestor by reason of such assels as fully as if an estate in law had descended in like manner. See 2. *Vern.* 248.

Stafford's Case.

If tenant sued in ancient demesne in nature of a writ of right put himself on the grand assise, the record shall not be removed, but he shall have a jury in the nature of the grand assise.

(47) **A**N abbot sued a writ of right close in ancient demesne, s. *Bromesgrove* in the county of *Worcester*, against *Humphry Stafford*, knight, and made his protestation to sue in nature of a writ of right at common law. And the tenant pleaded to the mise upon the grand assize, and prayed recognition to be made, whether he had more right, &c. And afterwards he sued an *accedas ad curiam*, directed to the sheriff of *Worcester* to remove the record, because the said *Humphry* hath put himself thereof upon the grand assize, &c. and, Whether this cause was good or not? was moved: and it seemed not. See 1. *H.* 7. [36. a. pl. 70.] in a note accordingly: and *T.* 17. * *E.* 3. [44. a. pl. 40.] and also *M.* 7. *E.* 3. [65. pl. 65.] in right, where *HERLE* awarded a writ to four men and not knights in lieu of the grand assize, for the smallness of the land, &c. With this agrees my old register, fol. 3. *de jurat. loco magnæ assizæ in Gavelkind. eligend.* and afterwards, *PER CUR.* a *procedendo* was granted, directed to the bailiffs in the principal case, above.

[Fitz.N.B.29.note(b).]

[* 112. a.]

[Cruise, Fines, 95.]

Droit. 22. *Regist.* 17.
13. *E.* 1. *Droit.* 51.

[Robinson, Gavelk. 254,
255.]

Bosse against Waters.

Trespass. Plea, that *A.* was seised in fee, and demised to the defendant. Replication, that *B.* was seised in fee, and demised to the plaintiff, without this that the said *A.* had any thing, &c. is bad.
6. *Co.* 24.

(48) **T**RESPASS for breaking a close was brought in the Bench by *Bosse* against *Waters*; and the defendant pleaded in bar, that before the trespass the dean and chapter of *Lincoln* were seised in fee as in right of their church, and made a lease for years to him by their common seal; and so justified, and gave colour to the plaintiff; to which the plaintiff replied, that long before the trespass one

Brudnel

Brudnel was seised in fee and enfeoffed the plaintiff in fee, and that he was so seised till the defendant committed the trespass, *without this that the said dean and chapter had any thing in the said tenements at the time of the demise, &c.* And the defendant rejoined, that the dean and chapter were seised in fee *ut supra, &c.* And this was holden a jeofail by all the Court, and the jury ready at the bar were discharged. *Accord.* 27. H. 8. fol. 32. in trespass.

5. Co. 33. b. B. N. C. 407. Dier, 122. Travers 372.

27. H. 6. 26.

19. H. 8. 7. Repleder, 25.

The traverse ought to be "*without this that the dean and chapter were seised in fee;*" [or the defendant might have traversed the lease at his election, for both are material to the plaintiff's title. *Hard.* 317. *Com. Dig.* tit. *Pleader*, G. 10. *Eul. Nt. Pri.* 93.]

(49) **A** MAN made a lease by indenture for a term of ten years, the term to commence immediately, and afterwards the lessor leased the same land by indenture for the same term of ten years to a stranger, the term to commence at the Feast of *Saint Michael* next ensuing, &c. and then the first lessee purchased the fee simple, so that his term was merged. The second lessee may enter after the Feast of *Saint Michael* and enjoy his term, &c. by the opinion of the Court in the Bench, *præter* BROWN.

Lease for years by indenture to commence from Michaelmas, substituting a former one; if the first lessee purchase the reversion, the second lessee may enter at Michaelmas.
Dy. 26. a. 58. 93. b. 177. pl. 35. B. N. C. 299. 349. 1. 5. Co. 153. 11. 4. Co. 53. Plow. 432. b. 299. 187. 434. a. Vide Inst. 45. a. 47. b. [3. Bac. Ab. 439. Shep. Touch. 274.]

Peeres against Bishop.

(50) **I**N debt on bond, the defendant pleaded *non est factum* generally, and gave in evidence *at nisi prius*, that after the making of the writing obligatory, by a communication and agreement between the parties, the said sum was paid to the plaintiff by the defendant, wherefore the plaintiff tore off the seal of the said defendant from the said writing obligatory, so that the writing here brought into court, and shewn to the said jury in evidence, wanting a seal, is not the deed of the said defendant, so that the said defendant should be bound by virtue of the said writing, &c. Whereupon it was demurred in law. And note, no evidence was entered on the *postea* to have been given on the affirmative part for the plaintiff, &c.

Whether payment and tearing off the seal by the plaintiff may be given in evidence upon *non est factum*?

5. Co. 119. b. Vide Co. Lit. 283. 11. H. 6. 27. a. 4. Co. 124. Dier, 58. [Shep. Touch. 67. 71. Bull. Ni. Pr. 171, 172. 5. Com. Dig. 249.]

An action brought against the administrator of an administrator for a debt of the first intestate, and *plead administravit* all the goods of the second intestate pleaded: *qu.*

Dyer, 47. b. 174. b. 202. a. 34. H. 6. 14. a. 10. E. 4. 1. b. 26. H. 8. 7. 5. Co. 9. 12. H. 7. Cro. 22. [Swinb. 189.

*(51) **D**E B T was brought against the administrator of an administrator, and so the defendant was called in the writ; and in the declaration the plaintiff did not surmise that administration of the goods and chattels of the first intestate was committed to the defendant, &c. And the defendant pleaded, that he had fully administered all the goods and chattels which were of the second intestate only, without saying any thing of the first intestate. *Quare inde (a).*

Went. Off. Exor, Supp. 117. 2. Black. Com. 506.]

(51) *Quare*, If the administrator waste the goods, Whether shall his administrator be charged for this, as an executor shall be charged for waste done by the first executor? as in *Dalton's Case*, 35. *Eliz.* it was adjudged. [They may now by 4. & 5. *Wil. & Mar.* c. 24. § 12. And see 1. *Wilf.* 258.]

(a) The plea is ill, as it tenders an immaterial issue: the defendant should have demurred to the declaration, since the ad-

ministrator of an administrator cannot be sued for a debt of the first intestate.

Marvin and Wife against Forde.

Covenant by an administrator, a release from the intestate pleaded: Replication, natural identity of the intestate, and issue upon it: Whether it is a joinfail?

Dy. 204. 217. F. N. B. 201. 32. E. 3. Scire Fac. 106. 10. Co. 51. 4. Co. 124.

(52) **A** WRIT of covenant was brought, and count upon an indenture made in the city of *Southampton* between *H. Windsor* in his life-time, and the said *Forde*, of bargain and sale of the manor of *Harting* in the county of *Suffex*, and of divers lands and tenements in *Eastharting*, *Westharting*, and *Southharting* in the said county of *Suffex*; and there were four covenants to be performed on the part of *Windsor* upon the assurance of the manor to be made to *Forde* before such a day: also delivery of the evidences, &c. also, that he and his wife *Eleanor* released all their right, &c. also, that the lands should be discharged or saved harmless, &c. And the indenture provided, that in consideration of the said bargain, sale, covenants, and grants, on the part of *Windsor* to be well and truly observed, fulfilled, &c. the said *Forde* covenanted and granted for himself to pay at certain days nineteen hundred pounds, to be severally paid, &c.

(53) And the plaintiffs said, that although the said *Henry* in his life-time fulfilled, &c. all and singular the covenants, grants, &c. on his part to be fulfilled, &c. yet the said *Forde*, although often requested by the said *Windsor* in his life-time, and by the said plaintiffs since his death, &c. and shewed the breach, &c. The defendant pleaded a release made at *Har-*

ting

ting aforefaid in the faid county of *Suffex* by *Windfor* after the making of the indenture of all actions, &c. To which the plaintiffs replied, that *Windfor*, at the time of the making of the releafe, was a fool and natural ideot, wherefore he had not the management of himfelf and his lands, tenements, and chattels, and fo was a fool and ideot from his birth until the time of his death; and this, &c. To which the defendant rejoined, and traversed the natural ideotcy as above. And it was moved and debated, Whether this was a jeofaile, &c. ? Also it was moved, That the *venue* cannot be from *Harting*, becaufe no *Harting* without an addition was mentioned in the record. And note, the *venire facias* was awarded to the fheriff of *Southampton* where the action was laid, and not where the releafe was pleaded, which is ill, as I believe. *Ideo quære.*

3. El. 204. a. Fit. 202. E.

4. Co. 124. Br. Prerogative, 35.

1. Inf. 124. b. 2. Rol. Ab. 604.

13. E. 3. 31, b. 5. 6. H. 7. 24. 3. 6. E. 4. 11.

The plea goes to the perfon, and is therefore well, and the trial good.

* Easter Term,

* [113. a.]

2. and 3. Philip and Mary.

Marvyne's Cafe.

(54) JUSTICE MARVYNE purchafed lands in fee of the king to hold *in capite*, and by fine conveyed an eftate to two in fee; and by the indenture declared the intent of the fine, s. that the conusees and their heirs should stand feised to the use of the faid Justice *Marvyne* and *E.* his wife for the term of their lives without impeachment of waste, remainder to *Henry M.* the youngest fon of the faid Justice and *E.* in tail, remainder over to the faid Justice himfelf and *E.* his wife and their heirs. And the wife furvived him and then died. *Quære*, Whether the heir shall have the third part by the ftatute of 32. H. 8. [c. 1.] or shall the faid *Henry*, who is heir to the faid *Elizabeth* his mother, have the whole according to the fine ?

If *A.* levies a fine of land *in capite* to the use of himfelf and wife for life, remainder to *H.* the rfon in tail, remainder to himfelf and wife in fee; Whether after her death his fon by a former wife shall have the third part by 32. H. 8. c. 1. or *H.* the whole ? *qu.*

2 E. 6. Bro. Testament, 24. Dyer, 191. 181. a.

6. Co. 77. B.N.C. 394.

[But by 12. Car. 2. c. 24. tenures *in capite* are abelished.]

Pecke against Redman.

In an action on the first breach of an agreement to deliver so much annually during the joint lives of the parties, Whether the jury can assess damages for the whole contract? *q̄.*

4. Co. 94. b.

10. Co. 128. B. N. C. 197. Bro. Action sur le Cafe, 108. 7. E. 3. 63. in Covenant.

2. Rol. Rep. 47. N. B. 130, 131. B. N. C. 495. 10. Co. 116, 117.

8. Co. 193. 19. E. 3. Abby, 13. [1. Hen. Bl. Rep. 551. 555.]

(55) **I**N B. R. a verdict given at the last assize by *nisi prius* for the plaintiff in an action upon the case upon an *assumpsit* was traversed. And the case was, That one Pecke and one Redman bargained together in the second year of Ed. 6. that Redman should deliver or cause to be delivered to the plaintiff (who was Pecke) twenty quarters of barley every year during their two lives between certain days, and shewed them in certain, and that the plaintiff should pay four shillings for each quarter; and shewed in the count that the defendant broke his promise, *s.* that he failed in payment of the forty quarters for three years, whereby the plaintiff was damnified in his credit and profit to the amount of thirty pounds. And the defendant pleaded in bar a condition in the said bargain, without this that he undertook in manner and form, &c. and the plaintiff *à contra*. (56) And it was found for the plaintiff, and damages assessed at four pounds, besides costs, &c. The question is, Whether the plaintiff shall recover the damages in recompence of the whole bargain as well for the time to come, as for the past, or not? because it seemed to divers Judges, *s.* BROOKE, SAUNDERS, and BROWN, that this contract, which has a continuance, cannot be intended to be recompensed in the damages assessed above, *s.* for the time to come, for they cannot have knowledge of what that will be. And PORTMAN, WHYDDON, and STAMFORD, *à contra*. *Ideo quære bene*.

(55) *Mich. 16. Jac. B. R. Beckwith v. Not* [Cro. Jac. 504. Jenk. 333.], adjudged that where a man brings an action for breach of *assumpsit* the first day, it is good to declare for the damages of the entire debt, inasmuch as he cannot have a new action, and the jury cannot give damages beyond what he has declared for.

4. Co. 94. b. Bro. *Action sur le Cafe*, 108. *sub fin.* Damages assessed in *assumpsit* are for the time past only. Cro. Rep. 7. Car. B. R. 241.

H. 9. Car. B. R. *Peck v. Ambler* [Cro. Car. 350. and 1. Jon. 329.]. Note that JONES [and] BERKELEY said, that if an *assumpsit* be brought for default of the † defendant the first year, the plaintiff shall recover damages for the whole time to come, and shall never have another action upon another default, for the promise is determined, *et transit in rem judicatam* by the first action. And they said [not in the printed reports], "that the judgment in *Pecke v. Redman* was afterwards reversed." Entered M. 9. Car. Rot. 348. See 4. and 5. P. and M. Moor's Rep. [13. case 51.]

(56) *East. 41. Eliz.* All the Court of B. R. agreed to this; for an action upon the case is given for a special loss, but no loss is in that which is to come.

† Orig. plaintiff.

Sir Richard Bulkeley *against* Thomas.

(57) **D**EBT was brought by *Richard Bulkeley*, knight, against *Rice Thomas*, sheriff of the county of *Anglesea* in *Wales* for one hundred pounds. And count upon the statute * 23. *H. 6.* [c. 14.] for the penalty for the bad and false return of one *Lewes*, who was not elected knight for the said county in parliament, whereas the plaintiff was legally elected by the greater number of the freeholders of the said county of *Anglesea* to be knight for the said county in the said parliament. And the plaintiff also alleged the statutes made 27. [*H. 8. c. 26.*] and 34. and 35. *H. 8.* [c. 26.] for the uniting of *Wales* to *England*, and to appoint the election of burgesses and knights for the counties and boroughs in the shire towns of *Wales* to come to the parliaments of *England*, and that the *Welshmen* should have and enjoy such laws, rights, and privileges, as any natural-born subject of *England*: and the conclusion of the declaration was, "and licet the said plaintiff was duly elected knight " for the said county to the said parliament by the greater " number of men, &c. yet the said defendant did not return " the said plaintiff, &c. but one *William Lewes*, &c. whereby " an action accrued." And the defendant demurred in law to the declaration, because the penalty of the statute 23. *H. 6.* shall not be extended to the sheriffs of *Wales*, who were not bound by that statute. And the new statutes of union of *Wales* to this realm say nothing of any penalty upon the sheriffs for the non-return or false return of knights or burgesses elected, &c. but only speak of the elections to be made as in *England*, &c. (58) Also by the greater number is uncertain to take issue upon, but the express number of freeholders shall be named, &c. And an exception was taken by GAWDY to the word (*licet*), &c. because it is not express affirmation in fact, that the plaintiff was chosen knight, &c. but argumentative, &c. And note in *Lib. Intrationum*, fol. 149. this word (*licet*) is not put in the declaration, but "by the greater number" is there admitted to be good. And issue was thereupon joined: and by the opinion of all the Judges in their arguments, this is good, and certain enough. And also the word "*licet*" they all agreed to be good, and a more elegant form than a con-

Since 27. *H. 8. c. 26.* the provisions of 23. *H. 6. c. 14.* extend to *Wales*.

In debt on 23. *H. 6. c. 14.* count that he was elected by the greater number generally is good; and licet he was elected, yet, &c. is sufficient averment.

Plow. 120. b. S. C. Rastal's Entries, 186. S. C.

Dy. 168.

Plow. 126.

Dy. 118. a.

junction copulative, STAMFORD EXCEPTED. (59) And also in the matter of law all except STAMFORD agreed with the plaintiff by the words of the statute 27. H. 8. that the subjects of *Wales* should have and enjoy all privileges, rights, and laws, as &c. And for the force of that word "*licet*," and that it implies matter of fact affirmative, see the writ *de cautione admittend.* [F. N. B. fol. 145.] and *de deonerand. pro ratâ portione* [fol. 535.], and the writ *de idemptitate nominis* [fol. 598.]. And note always, where the matter under the *licet* is material, and of substance, then it is traversable, as the words *cum, tanquam, ut, &c.* are sometimes matters of fact, &c. And afterwards in Trinity Term the plaintiff had judgment * to recover: and afterwards a writ of error was brought, and all the exceptions and matters above assigned for error, and also in the entry of the averment at the end of the declaration, which was, *and this, &c.* without saying *is ready to verify, &c.* which was the fault of *Rockwood* the clerk: but it was not proceeded upon, because the parties agreed. See the like in the star-chamber, in an information by the queen against *Brunker, T. 1. Eliz.* † fol.

B. N. 63. a. 234. b.

6. E. 4. 8.

* [114. a.]

Dy. 134. b.

Ingeri against the Executors of Hyde.

A covenant that the lessor shall pay quit-rents during the term does not extend to his executors.

Dy. 14. a. 257. a.

Cro. Jac. 523. 10.

H. 7. 18. b. 47. 48.

E. 3. 22. a. 2. a. N.

B. 19. F. 5. Co. 15.

12. H. 8. 11. Wentw. 178.

[Sheph. Touch. 174.

Cro. Eliz. 552. 1.

Com. Dig. 242. (B. 14.)

2. Vern. 322. See

Cowp. 374, 5, 6.]

(60) **GEORGE HYDE** the testator made a lease by indenture for a term of years to one *Lincoln* rendering certain rent, in which indenture was this clause, *s. And the said G. H. covenanteth and granteth to bear and pay all quit-rents going out of the premises during the said term:* and *LINCOLN* granted his term and interest to *Ingeri*. *Quære*, Whether the executors are bound to pay the quit-rents, or not? And divers of the Judges thought not; because it was a personal covenant in the lessor only, which died with the person: *tamen quære*.

Tervillian *against* Parkins.

(61) **I**N trespass for breaking a close between *Tervillian*, plaintiff, and *Parkins*, defendant, the issue was, Whether the tenements where the trespass was supposed were customary and demised, and demiseable by copy, &c. from time whereof, &c. as the defendant alleged, or not? And at *nisi prius* the jury gave a special verdict, *s.* that the tenements aforesaid for sixty whole years next before the taking of this verdict were demised and demiseable as well by copy, &c. in fee-simple, fee-tail, for term of life or years, or otherwise, &c. as by indenture, in form following, *s.* that such a lord of the manor within the said term of sixty years made three several leases by three several copies at several times to three several persons, one of them after the other, for the term of the life only of each lessee; and afterwards, *s.* 10. *H.* 8. the lord demised the premises by indenture for the term of eighteen years, if the lessee should so long live; and that afterwards, *s.* in the twenty-third year of *H.* 8. the lord leased the tenements by copy to the defendant for the term of his life, as he has pleaded in bar, and concluded, “and so the said lessees continued, and had estate and possession “of the said tenements with the appurtenants, in manner and “form aforesaid, for the space of the said term of sixty years;” and prayed the advice of the Court, whether this land was customary and demiseable by copy, or not: and if it be not adjudged copyhold, then they assess damages * for the plaintiff, &c. And by the opinion of the Court this verdict is void, and a new *venire facias* shall issue. See the like, *Trin.* 13. *Eliz.* fol. [284. a. pl. 32.]

Issue whether lands be customary and demised, and demiseable by copy, &c. a special verdict stating four leases by copy, and one by indenture from the lord during sixty years last past, the Court awarded a *venire de novo*.

9. Co. 14.

4. Co. 21. 35.

[Wood's Inst. 136.
Doug. 720, 721. 2.
Term Rep. 424. 2.
Wil. 125.]

[Skin. 109.]

[Co. Lit. 226, 227.]
* [114. b.]
Dyer, 118. 173. b.
Plow. 29. 9. H. 7. 4.
[Bac. Ab. Verdict (D).
5. Com. Dig. 157.]

(61) *French's case*, 4. Co. 31. 2. If the lord lease by indenture the copyhold is extinct for ever. 4. Co. 24. b.

Prescription is not determined by interruption for a time. 26. Aff. pl. 4. [Co. Lit. 114. 2. Black. Rep. 989. See Cro. Eliz. 699. Co. Lit. 58. b. and ante 7. there:]

Milborn *against* Ferrers.

(62) **T**HE father being sole seised of a manor in fee, he and his eldest son make a feoffment by deed indented in the fourth year of *E.* 6. to certain persons in fee,

If *A.* and *B.* his eldest son enfeoff to the use of *A.* to the use of his youngest son for life, provided that he permit

B. to make leases, remainder to the use of A. in fee, *qu.* Whether a lease made by A. for twenty one years be good?

1. 8. Co. 136. 71. Dy.
154. 155. B. N. C.
184. Styles, 149.

to the use of the said father, to the use and behoof of T. the younger son of the said father for his life; provided always, that the said younger son should, during his life, permit the said eldest son and his heirs to nominate the tenants, and let to farm for term of life, or years, the said manor, &c. or any parcel thereof, reserving the usual farm and rents to the said younger son during his life, and after his death then to the use and behoof of the said father and his heirs; and afterwards the father alone made a lease of the manor for term of twenty-one years; Whether this lease be good? *quære.*

Vaux against Jefferen and Others.

In assize of the office of filazerno disseisor named is a good plea, and the post where he sits shall be put in view.

The Court may discharge such officer *ex tenuis* without entering it of record.

Ante, 7. b. 8. Co. 47.
b. 8. E. 4. 16. b. N.
B. 178. Dy. 78. b.
149. 16. E. 2. Aff.
370. 7. 15. Aff. 12.
5. 2. 15. H. 7. 11. 5.
32. 35. H. 6. 15. 7.
1. Rol. Ab. 270. D. 1.
2. Rol. Ab. 264.

9. E. 4. 5. b. 5. E. 4.
2. 18. E. 3. 27.

[1. Com. Dig. 410,
Booth Real Act. 271.
272.]

9. E. 4. 11. b. Dy.
153. 3. H. 6. 22.
19. E. 3. View. 77.
90. 18. E. 4. 26.
18. E. 2. Aff. 383.
21. E. 3. 57. 2. Rol.
Ab. 155.

[Yin. Ab. View. L.
Booth Real Act. 282.]

(63) ASSIZE was brought by Nicholas Vaux against Jefferen, Lynton, and Keble, directed to the sheriff of *Middlesex* of a freehold in *Westminster*. And he made his plaint of the office of one of the filazers of the common bench, *s.* filazer of the cities of *Southampton* and *Wilts* in the said bench, and made his title in his plaint, and alleged the custom, that every *Chief Justice* of the same court for the time being was used, and from time whereof, &c. was accustomed to grant, give, and assign every office, &c. and shewed further that he was the grantee of *BALDWIN*, late *Chief Justice*, when the office was void, and was admitted, and was sworn officer in *Hilary Term*, in the 33d year of *Henry 8.* and that he was seised by taking three-pence of *A. B.* for a *capias* against *C. D.* in a plea of trespass, &c. And *Keble*, who is now the officer, took upon himself the tenancy of the office, and pleaded to the writ *nul disseisor* named in the writ, and if &c. *nul tort, &c.* And the others pleaded *nul tort, &c.* And note, the place where the plaintiff sat when he was first admitted to the office, which was next the post at the higher end of the place in the hall, was put in view, and the jury examined on the view of it, &c. (64) Also the plea above, *s.* *nul disseisor*, was allowed good. And upon the evidence it appeared that *Sir E. Mountague* in his time for a misdemeanor committed by the plaintiff in his office, *s.* for his absence during two years, and for farming his office from year to year without leave of the Court, by the opinion of the whole Court discharged *Vaux* of his office,

Dy. 157. 20. E. 4. 6.
2. Dyer, 7. b.

office, and admitted *Jefferen* into it, &c. And no record of this discharge * was entered upon the rolls, nor was *Vaux* ever called upon to answer according to law. 2. Inst. 47.

And it was moved that *Jefferen* was no disseisor, for he came in by the Court, and then the Court was the disseisor. *Sed hoc non allocatur* by all the Judges, for the new officer is to look to that at his peril: and if there was no cause of forfeiture in the old clerk, then the new clerk shall be adjudged disseisor of an officer, for the Judges cannot be officers, &c. And by the opinion of the Court, although no record was entered on the rolls of the cause of forfeiture, or of the discharge of *Vaux*, yet when the LORD MOUNTAGUE, who was *Chief Justice*, discharged him with assent of his companions openly in court by parol, calling *Vaux* unto him, which was fully proved, this was a good discharge, and no cause of assize to the plaintiff; wherefore, &c. And afterwards the jury found against the plaintiff in every thing.

If one execute an office by appointment of the Court to which another hath right, he is a disseisor.

[Booth Real A&T. 235.]

39. H. 6. 34.

N. B. 131. 2. b.

1. Rol. Rep. 452.

Opinio, 4. Co. 25. a.

67. b. Plow. 492. a.

[Hardr. 127.]

The Queen against Austin.

(65) **HENRY** 8. by his letters patent bearing date the 31st year of his reign granted the manor of *Eosfarleigh* in *Kent* to *Sir Thomas Wyat*, knight, and the heirs male of his body begotten. And afterwards the said *Sir T.* by indenture bearing date the 33d year of *Henry* 8. leased the said manor to one *Austin* for a term of thirty-six years, rendering and paying therefore yearly to the said *Thomas*, his heirs, and assigns, thirteen pounds, &c. whereupon the lessee entered. And afterwards the said *Sir Thomas* died seised of the said reversion, which descended to *Sir Thomas Wyat* as son and heir male; which *Sir Thomas* accepted the rent of the termor, and then had issue *Arthur Wyat* now alive: and afterwards the said *Sir Thomas Wyat* the son committed treason, for which he was attainted at common law, and the attainder afterwards confirmed by parliament, and that he should lose, and forfeit to the queen and her heirs, all his manors, lands, reversions, rights, and hereditaments, of any estate of inheritance, with a general saving to all strangers, &c. and that the queen should be deemed and adjudged in actual and real possession. And upon an information of intrusion in the exchequer brought against

Tenant in tail of the gift of the king leases for years and dies, his heir accepts the rent, and is afterwards attainted; the king is in by reverter, and shall avoid the lease, notwithstanding the acceptance of rent.

Plow. 560. a. 7. Co. 8. b. Supra, 107. b. Dier, 188.

Co. Lit. 46.

8. Co. 71. a.

23. H. 6. 14.
Dier, 116. 7. b.
25. H. 6. 8.

the said *Austin* the termor, this case appeared in the bar. And upon the bar the Attorney General demurred in law: and note, that it was furnished in the information, that the said manor was in the hands of the king and queen, by reason of the attainder of the said *Thomas Wyat*.

To an information of
intrusion letters patent
pleaded without a *pro-*
fert.

[1. Term Rep. 149,
150. Salk. 497. Bul.
Ni. Pr. 252.]

10. Co. 92. a. 7. 31.
H. 6. 4. 14. Dier, 29.
b. Plow. 81. b. 148.
1. Co. 100. Mor. 369.
Lit. 24.

* [115. b.]

(66) And the defendant pleaded the case as above without making a *profert* (a) to the Court of the letters patent made by *Henry 8.* to the said *Sir T.* the father. Note this; and also the reservation of rent to himself, his heirs, and assigns, as above. Note this rent, and whether it descends to the heir in tail; for the * descent was pleaded of the reversion only, without speaking of the rent; and also that it descended to the said *Sir Thomas* the son, as son and heir male of the body of the said donee, &c. when it may be well intended that he had another heir, s. a daughter of his eldest son, to whom the rent descended, or to his executors; wherefore, &c. And, Whether the queen shall be concluded by this acceptance of rent by, &c. and, Whether he shall be adjudged in merely by the said *T. W.* who was attainted, so that she cannot avoid the term as long as there is any issue of the body of the patentee in full life, or not? was the matter in law. And in the next Term, upon argument at bar and bench in the exchequer, judgment was given for the lady the queen against *Austin*; and for the matter in law, as *BROOK, Chief Baron*, said; for it was holden that the entail was utterly extinct and determined, and then the queen is seised of her old fee-simple executed, and cannot be adjudged in of a fee-simple determinable upon the tail, for then there would be two fee-simples in the queen, which would be absurd.

Dyer, 107. b. Hob.
324. Plow. 560. Qua.
Imp. supra, 26. 1.
Inst. 18. a.

[1. H. H. P. C. 254.
Salk. 338. 3. Bac. Ab.
316.]

(66) *M. 6. Jac. Needham and Poole's case* [Yelv. 149.] in *B. R.* It was adjudged by the Court, that if there be tenant in tail, remainder in fee, and he in remainder give land to the king so long as *I. S.* has heirs of his body, if tenant in tail make a lease for years, and is attainted of treason, the king shall not avoid the lease. Also it was agreed in that case, that if the estate had been limited to the king and his heirs, so long as one has heirs male of his body, if he die leaving a daughter at the time of his death, and a son be born afterwards, the estate is determined.

(a) By 16. and 17. *Car. 2. c. 8.* after verdict judgment shall not be staid or reversed for default of alleging or bringing into court any deed mentioned in the pleadings. And by 4. *Ann. c. 16.* no advantage or exception shall be taken for want of a

profert in curia, &c. but the Court shall give judgment according to the very right of the cause without regarding any such omission or defect, except the same shall be specially set down and shewn for cause of demurrer,

Teril *against* Dune.

(67) A COVENANT in an indenture was, that *Dune*, who was lessee for years of certain land, should not cut any trees whereby they should be wasted; and the defendant cut ten oaks, &c. by which the covenant was broken: and upon this the lessor brought an action of debt for forty pounds upon a bond indorfed for the performance of the covenants, and assigned the breach in cutting twenty oaks, whereby they were wasted. And the defendant pleaded, that he did not cut the aforesaid twenty oaks, or any of them, in manner and form as, &c. And the plaintiff replied, that he did cut twenty oaks, as he above alleged, and this he prayed might be inquired of by the country: and the said defendant did the like. And it was found at *nisi prius* that *he did cut ten oaks, &c.* And it was much debated whether judgment should be given upon this verdict, or not: and at length judgment was given for the plaintiff. For although the whole allegation of the breach of the covenant was not found for the plaintiff, still enough is found to make the defendant forfeit his bond; and the rest that the plaintiff alleged was only surplusage, and not double matter; wherefore, &c.

A like case was so adjudged, *Trin. Term, 22. Eliz.* between *Wolman* and *Ellis*, in the last roll 920. of *Hilary Term*, where the obligor was bound that he should not do waste, &c. And he pleaded first in bar, that he had done no waste, &c. And the plaintiff replied that he did waste, *i. in cutting twenty oaks, &c.* And the other rejoined, that he did not cut the said twenty oaks in manner and form as the said plaintiff had alleged, and of this he puts himself upon the country, &c. And it was found by verdict, that the defendant had only cut ten oaks, and the jury prayed the advice of the Court.

In debt on a bond for the performance of covenants, breach that he cut down twenty oaks—plea that he did not cut down twenty oaks, nor any of them—a verdict that he did cut down ten will support the declaration.

Co. Litt. 282. a. 2. Rol. Ab. 706. 2. Leon. 100. Cro. Car. 84.

2. Co. 24. B. N. C. 47. 2. Rol. Rep. 186, 187. 9. Co. 14. Hob. 52, 53. 3. Cro. 882.

[Cro. Car. 212. 2. Term. Rep. 666. Post. 370. pl. 58.]

Dier, 219. 5. Co. 56. Lit. 113. b. 9. H. 7. 4. 12. 13. 30. E. 3. 5. b. 33. 25. b. Bro. Issue, 80. 8. Annuity, 33. Br. Wast. 204. Dy. 32. 175.

WOLMAN v. ELLIS.

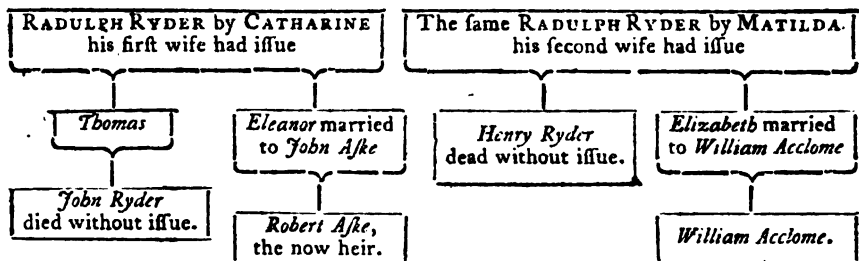
3 Cro. 84.

[Bul. Ni. Pr. 299. 1. Term Rep. 239, 240. 659. 3. Term Rep. 643. 4. Term Rep. 558.]

(67) *M. 30, 31. Eliz. Rot. 610. Bond v. Richardson* [Cro. Eliz. 142.]. Debt on bond to pay one hundred pounds at a certain day and place, the defendant pleaded performance, and the jury found payment before the day at another day and place, and judgment that the plaintiff should be barred. [4. and 5. An. c. 16. §. 12.]

T. 43. Eliz. between *Meredith* and *Brown* [2. Rol. Ab. 703. pl. 13.], it was adjudged in *B. R.* in an *ejectione firme*, supposing the ejection out of ten acres, and the jury finding the circumstances only in four acres, that the plaintiff should recover those four acres. But *¶ Dame Baskervill's* case in 29. *Eliz.* was assize brought of a park containing sixty acres, and the jury found the disseisin of thirty acres only, and adjudged against the plaintiff for all. But note here the park was an entire thing.

* Ryder's Case.



Whether a devise by a tenant in tail be a discontinuance?

Lit. 624. 27. H. 8. 27.
9. E. 4. 22.

(68) **T**HE said *Thomas Ryder* by his last will devised his lands and tenements to *John Ryder* his son and the heirs male of his body; and for default of such issue, the remainder to the heirs male of *Sir Radulph Ryder*, knight; and for default of such issue, remainder to the right heirs of the said *Thomas Ryder* for ever.

MEMORANDUM, That the said *Henry Ryder* had possession of the lands, &c. and by his last will in writing devised the said lands to one *John Ryder* in tail, who late was the conferrer of the king's household, which *John* had issue *John Ryder*, who now is to sue out his livery. And note, it was found by office after the death of the said *H. R.* that he was thereof seised in fee, which was false if no discontinuance was made by him in his life-time. *Ideo quære.*

Lit. 139.

Devise by tenant in tail is not a discontinuance, for it does not take effect till after his death. [See Co. Litt. 334. b.] See the Abridgement.

Whether a vicarage be void by a certificate of the bishop stating the obstinate refusal of the incumbent to pay tenths and first-fruits?

2. Keb. 323. 482. 1.
E. 6. B. N. C. 332. 6.
H. 8. Bro. Certificate
de Eveſque, 31. in fine.
1. Anderſ. 3. Benl. 35.

(69) **T**HE *Archbishop of York*, in 5. & 6. Ed. 6. certified in the late Court of First Fruits and Tenths by these words, "*We have applied all manner of diligence by our sub-collectors through the whole diocese of York, and we have found J. C. Vicar of Gargrave, refusing to pay the subsidies of his vicarage, who can by no fear of punishment be brought to the payment of the said subsidy, but perseveres in his malicious obstinacy.*" *Quære*, Whether by this certificate the vicarage be void, or not? See Statutes of Subsidies granted by the Clergy, &c. 2. & 3. Ed. 6. [c. 20, § 3] and 26. H. 8. [c. 3. § 18.]

[See stat. 3. Geo. 1.
c. 10.]

See this *infra*, 237. a. pl. 29, that it is *ipſo facto* void. B. N. C. § 332.

Mount *against* Hodgkin and Another.

(70) A MAN made a lease for a term of years by indenture bearing date the 30th day of *August*, 23. H. 8. the term to commence at the Feast of *Saint Michael the Archangel* then next ensuing, and to continue to the end of twenty-one years, &c. And afterwards the said lessor, by indenture reciting the former lease, and that it bore * date 6. *August* in the year aforesaid, which was a false date, demised and granted the land to a stranger within the term, to have and to hold to him, &c. for the term of twenty-one years, immediately after the expiration and end of the first lease and indenture, &c. And afterwards the second lease took effect and commenced; and this second lease was in question in pleading, which pleading was, that the first lease bore date the 30th day, as the truth was; and a traverse taken, that the said lessor did not demise, &c. to the said second lessee in manner and form as above alleged. And, Whether this issue be, so that he did not demise, or not, by reason that "*in manner and form*" refer to the whole lease, and no such lease was made bearing date the 6th day of *August*, &c. ? therefore *quære*. And note, the second lease was pleaded, with the recital of the true date of the first lease, s. the 30th day of *August*, but upon the shewing thereof in evidence it appeared a plain variance as above. And yet at length it was adjudged, that *modo et formâ* are of no signification here; and the indenture of the second lease was specially found *in hæc verba* by the jury, praying the advice of the Justices, whether a demise by the said indenture was a demise *modo et formâ* as pleaded, and if it be a demise, then the jurors assess damages, &c.

A second lease which recited a former one under a false date being pleaded, and the true date alleged in the pleading, is good on *non demisit modo et formâ*, and the variance immaterial. [1. And. 3. Bendl. 38. S. C.]

Dier, 195. 93. 10. Car. Cro. 399. R. 212. 242. 437.

1. Mar. 95. b. 1. Infl. 46. b.

* [116. b.]

[See Mr. Hargrave's note (10) to Co. Lit. 46. b.]

[Bul. Ni. Pr. 300, 302. 2. Bac. Ab. 663.]

9. 33. H. 6. 61. b. 28. & 30. Plow. 85. b. Lit. 114. a. 483. 2. Ro. Ab. 682. Hob. 73. Bro. Leases, 62.

(70) *East. 37. Eliz. C. B. Skinner v. Gray and Giles* [Bro. Ent. 418.]. One avowed and alleged seisin within fifty years by the hands of J. S.; plaintiff traverses, without this that he was seised *modo et formâ*, &c.; the jury found that he was seised within fifty years by the hands of J. D.; and adjudged for the avowant.

And because the words of this second lease made to the second lessee as above were, * to "*have and to hold to the said Lamborne the lessee until the end of thirty years then next ensuing immediately after the demise and indenture of the said first lessee fully ended and expired*," and were not "*to have and to hold after the said demise and indenture of the said first lessee fully ended*," the said lease made to the second lessee is good, notwithstanding this false recital of the 6th of *August* mentioned in the said indenture, for this recital was as void, and the said lease made to the second lessee took effect by the demise and the *habendum*. And so was the opinion of all the Judges of C. B. upon the view of all the indentures; wherefore the said parties proceeded to issue upon the demise; and this was found with the plaintiff upon a verdict at large, whereupon he had judgment, according to BENDLOE [38. pl. 71.]. See § 21. H. 7. 38, 39.

Ibgrave against Lee, Knight.

Bargain and sale by indenture subsequent to the ejectment, pleaded *as such* in *ejectione firmæ*, is bad; it should be as a release or confirmation; and the plaintiff cannot reply, he did not grant by his deed, but must either deny the deed or that he had any thing at the time.

3. E. 6. 83. Aff. de Portione Decimarum. 45. 16. H. 7. 3. 7. a. 26. H. 8. 2. b. Dier. 29. 115. 117. b. 258. 9. Car. Cro. 301. Styl. Rep. 101.

[Co. Lit. 159. 3. Black. Com. 206.]

2. Rol. Ab. 45.

[Shep. Touch. 242, 243.]

Perk. 85, 86. Dier, 91.

* [117. a.]

7. E. 4. 6. b. 33. H. 6. 42. a. 5. H. 7. 1. 1. Intt. 355. b. Note, that a bargain and sale may be pleaded as a release or confirmation.

20. E. 4. 1. a. 43. E. 3. 1. b. 9. 21. E. 4. 47. 12. 28. H. 6. 6. 6. H. 4. 6. 21. H. 7. 21. 29. H. 8. 12.

Lit. 495. 31. Aff. 24. 28. H. 6. 67. Ante, 209. b.

(71) **I**BGRAVE brought *ejectione firmæ* for certain tithes of corn and hay in *D.* near the town of *Saint Alban's*, against *Sir Richard Lee*, knight; and suggested himself lessee of a term of years as assignee of *Sir Francis Brian*, knight, to whom *Henry 8.* by letters patent made a demise and grant for the said term: and shewed the letters patent of the lease, &c. and supposed the ejectment in the 35th year of *H. 8.* and the writ was for a term not yet expired; and the defendant pleaded a grant, bargain, and sale of the plaintiff himself in bar by indenture made in the first year of *Edw. 6.* of all the estate, term, title, and interest of the plaintiff: to which the plaintiff replied, and maintained his count, "with-
" out this that he grant d, bargained, and sold by the said
" indenture his whole estate, term, &c. *prout;*" *et alii contra.* (72) And now the jury was at the bar ready to give their verdict. And exceptions were taken that this was a jeofail: first, because the time of the ejectment is not sufficiently answered, for it is supposed that the ejectment was in the 35th year, wherefore the lessor had only a right in the term, and his right cannot be extinguished except by release, or confirmation made to the ejector, who by presumption shall be intended to be in possession at the time of the indenture made, as appears in * the case of 6. *H. 7.* [8. a.] of a gift of the goods to the trespassor: and also here the term is not the principal to be recovered in this writ, but damages are the principal, and the term (if any part be to come) is only accessory or incident, *per SAUNDERS*; and then this indenture ought to have been pleaded as a release or confirmation. And the other exception was, that the plaintiff ought to take his traverse to the deed, he being privy to it, and not that he did not grant by the deed; for here the thing is a tithe only, which cannot pass without deed. But by *STAMFORD, Justice*, he ought to have pleaded, that *he had nothing in the term at the time of the grant made:* as if a man would avoid a release pleaded against himself, he shall say, that *he to whom the release was made had nothing at the time of the release made*, and so avoid his deed; or otherwise

(71) *Trin. 5. Jac.* the Court agreed that the action lies, and *East. 31. Eliz.* agrees also; whence note that the lessee may have *ejectione firmæ* although the reversion be in the king: wherefore it seems that the ejector by his entry has gained the land, 2. *H. 6. 6.* Co. Lit. 239. a.

to have pleaded *non est factum*, and not as above. And for these causes the jury was dismissed, and a replender awarded by the Judges.

Hall against Wiseman.

(73) **R**OBERT HALL brought a writ of second deliv-
erance against *John Wiseman* for taking a barge
at *Gravefend* in a certain place there called the *King's Stream*
of *Thames*. And *Wiseman* avowed the taking for four shil-
lings of an annuity or annual rent being in arrear for three
years at the Feast of *Saint Michael* next before the taking ;
and shewed, that one *Love* was seised in fee of the common
passage or ferry over the river *Thames* at *Gravefend*, com-
monly called *Gravefend Ferry*; and that *Wiseman* himself
was seised of a messuage or common inn, called the *George*,
in *Milton* near *Gravefend* aforesaid, in fee; and prescribed that
he and all his ancestors, and all those whose estate he hath
in the messuage or inn, have used to sustain and repair a pier
of the bridge at *Gravefend* aforesaid, in consideration whereof
he and his ancestors, and all those whose estate he hath in
the messuage, have had of the said *Love* and his ancestors,
and all those whose estate he hath in the ferry, the said an-
nuity and rent of four shillings *per ann.* payable at the Feast
of *Saint Michael* at *Gravefend* aforesaid; and prescribed
also, that for the non-payment *Wiseman* and his ancestors,
&c. have used to distrain any barge in the said place where, &c.
appertaining or belonging to the said ferry, and to retain it
till they were satisfied, &c. and shewed in fact, that the
bridge was well repaired and sustained for all the said term
of three years, and also that the barge was appertaining
and belonging to the said ferry, &c. And to this avowry
GAWDY demurred in law.

Whether a ferry-boat
may be distrained for
an annual rent payable
by prescription by the
owner of a ferry on con-
sideration of keeping the
pier of a bridge in re-
pair?

F. Avowry, 192. Da-
vis, 57. 11. H. 4. 13.
Regist. 81. 26. H. 8. 5.

10. Co. 59.

5. Co. 78. b. Gray's
Case. 14. H. 8. 25.
Chose de Common Pro-
fit.

26. H. 8. 5. 30. Aff. 6.
Inst. 47. 7. H. 7. 1.
What Things shall be
distrained.

[Carth. 357. 1. Ld.
Raym. 384. and see 4.
Term. Rep. 565. 2. Bac.
Ab. 108, 109. 2. Com.
Dig. 119, 120.]

* Stubbe's Case.

(74) **C**ESTUY QUE USE in fee before the statute 27. H. 8.
[c. 10.] devised the land by his last will to his wife
during her life, *ita quod* she should not do or permit any waste,

(74) See *infra*, 126. b. 10. Co. 40. b. This remainder destroys the condition, so that
the heir cannot enter.

* [117. b.]

On a devise of land by
a *copy* que use to his
wife for life, *ita quid* she
should not waste, re-
mainder after her death
to the younger son in
tail, Who shall enter for

remainder

the condition broken? also, Whether by such entry the remainder be defeated? *qu.*

Dyer, 30. 74. 122. 204.

Plow. 412. N. B. 201.

C. Perk. 831.

[Swinnb. Wills, 149, 150.

Shep. Touch. 401, 402.

1. Eq. Ab. 105. note (a).

Fearne Cont. Rem. 193.

195.]

remainder after her decease to his second son in tail, and died. And after the statute the wife did waste: *quare*, Whether the heir of the devisor or the feoffees, or he in remainder, shall enter now for breach of the condition? and, Whether by such entry the remainder be defeated, or not? *quare bene*, for it is a good case.

If tenant in tail make a feoffment upon condition, and die leaving two sisters inheritable to the entail, and one levies a fine of the whole *sur release* to the feoffee; Whether this is a bar to the other for her moiety after the five years? *qu.*

33. H. 8. c. 36. Rast.

Fines, 9. 2. Inst. 517.

1. Anderf. 37. Bendl.

27. [Shep. Touch. 24.

Cruise on Fines, 104.]

(75) **J**OHNSON S. tenant in tail, made a feoffment upon condition that the feoffees within one month should make back an estate in fee to the said J. S. and if he died before any estate or any request made, that then the feoffees should make estate to a stranger in fee. J. S. the feoffor died without issue (no estate being made back to him, or any request made by him), having two sisters inheritable to the entail, and one of them levied a fine of the entire land *sur release tantum* with proclamations to the stranger being in possession of the whole; and the five years passed: Whether this fine be a bar to the other sister for her moiety and part, or not? *quare*.

Jones against Weaver.

Pleading a demise for life to commence after the death of A. is bad, no livery being shewn to pass an immediate, or attornment (a) to pass a reversionary interest. Pleading "by indenture" *witnessing a demise from "A."* is not sufficient averment that A. demised.

Dy. 29. b. 115, 116. b.

Note that the letters patent were not shewn in

28. H. 8. 29. pl. 199.

10. Co. 92, 93. Dr. Ley-

field's Case, that they

should be shewn.

(76) **I**N REPLEVIN, the defendant made conuſance as bailiff to one Sentloo for *damage feasant*, supposing that King Edward 6. leased the land to one A. B. for a term of years, who granted parcel of his term to the said Sentloo, and so concluded for *damage feasant*: to which the plaintiff pleads, that long before the said King Edward had any thing in the land, one John, late Abbot of K. was seised of it in fee in right of his church; and being so seised, with the assent of his Convent, by indenture bearing date 14th year of H. 7. at D. (where the land was) *witnessing that the said Abbot and Convent, after the death of J. P. and A. his wife, and J. W. and A. his wife, demised and delivered to the said plaintiff the said land to have to him for the term of his life*, as by the said indenture more fully appears; and that before the said

(a) Now by 4. Ann. c. 16. § 9. attornment is rendered unnecessary; and by 11. Geo. 2. c. 19. in some cases, absolutely void. See Dougl. 282.

time when, &c. the said two husbands and their wives died, after whose death the said plaintiff entered, and was thereof seised in his demesne as of freehold, and being so seised put his cattle into the said place in which, &c. (77) And the defendant maintained his avowry, and traversed this lease of the Abbot and Convent; upon which they were at issue. And the jury gave a special verdict, and found the lease as above *verbatim*; but they concluded, that they had no letter of attorney to make livery of seisin in the indenture, as appeared to them. And they prayed the advice of the Justices whether it was a good lease in law or not; and if, &c. they assess damages for each party, if, &c.

Dowman's Case, 9. Co. 12. 14. a.

Dyer, 109.

[Cro. Eliz. 905. Shep. Touch. 212.]

* [118. a.]

[There cannot be a special verdict upon a special issue. But see 5. Ccm. Dig. 157. Bac. Ab. Verdict (D).]

Dyer, 114. b. 184. 7. 9. H. 7. 4. 5. & 13. b. 21, 22. H. 6. 14. 19. 19. E. 4. 1. Plow. 92. 2. Co. 12. 3. Cro. 245. cont'. 1. Inst. 226. b. 227. b. 9. Co. 7. cont.

2. Co. 55. a. 5. Co. 94. a. 3. Mar. 125. b. 36. H. 8. 58. b. 23. El. 377. a. Plow. 345. 149. 4. 8. Co. 18. 82. 22. E. 4. 8. Plow. 126. 28. H. 6. 4. Bro. Pleadings, 110. Dyer, 113. b. 184. b. Dy. 254. b. Plow. 122. 2. Cro. 537

And upon this verdict the Court * awarded a repleader, because a special verdict cannot be given upon a special issue joined; wherefore the Court awarded that they should commence to plead a-new at the avowry; and so they did. And the defendant made another confession like the first *verbatim*, and the plaintiff pleaded in bar as above *verbatim*; and thereupon the plaintiff demurred in law. And without any argument at bar or bench the bar was adjudged insufficient, for the lease made by the Abbot and Convent as above cannot be good, for it did not take effect as a lease immediate, because it was to commence after the death of two husbands and their wives, and nothing in their lives, and it does not appear that any livery of seisin was made. And also as a reversion it was not good, for no attornment was pleaded, &c. And also the form of pleading the indenture as above, *s. that by a certain indenture witnessing that they demised*, does not shew in fact that they did demise, but that the indenture witnessed that they demised, which is not sufficient (*b*), any more than the pleading in 21. E. 4. [49. a. b. pl. 6. *sub fin.*]

(77) E. 35. Eliz. B. R. in *ϕ Herti's Case* by FENNER that he argued, and it was so adjudged in C. B. that a repleader may be after a demurrer, according to [9. H. 6. 35. a.] *ϕ* 35. H. 6. 19. a. [18. Vin. Ab. 570. 4. Bac. Ab. 129. 5. Com. Dig. 155, 156. and see Cowp. 510. Dougl. 396.]

(*b*) What was sufficient pleading of such indenture formerly was the subject of nice distinction. It seems to have been holden ill to say, "*by an indenture &c. it is witnessed that A. demised*," in all pleas, avowries, and replications, Cro. Jac. 537. Cro. Eliz. 195. 1. Saund. 274. 2. Saund. 319. and in a declaration in debt on a demise, 1. Lut. 535. But in a declaration on a covenant it was holden good, 1. Lutw. 535. Cro. Eliz. 195. Cro. Jac. 383. 537. Sid. 375. But

see 1. Salk. 515. *cont'*; and in debt on a charter party, though it be not a covenant, 2. Lev. 74. But the usual mode of pleading at present is in all cases to follow the words of the indenture, as on a lease, "*by a certain indenture made, &c. at, &c. it is witnessed that A. did demise, &c.*" and this is never objected to, nor does it at all appear to want further averment. See Cowp. 665. Dougl. 667.

s. that

1. Rol. Ab. 143.

s. that it appears by the record, that, &c. And for these causes the defendant had a return of the cattle to retain to him irrepleviable for ever. And the plaintiff took nothing by his writ; and a writ *de return. habend.* was awarded; and also in the same writ the sheriff was commanded to enquire of the damages, &c.

Newdigate against Auncel. B. R.

In the king's bench, in a bill of trespass laid in *Middlesex*, the defendant need not be charged to be in the custody of the marshal.

After issue joined, the king died, and a precept was made to the sheriff without writ or *teste* of the Chief Justice to reattach the defendant, and a *hab. corp.* against the jury, and holden good in *B. R.*

22. H. 6. 24. 7. Co. 30.

Discontinuance, 23.

[1. E. 6. 7. §. 1.]
1. Keble. 483.

7 Co. 29.

[5. Com. Dig. 19.]

(78) **I**N *B. R.* a jury appeared between *Newdigate* plaintiff and *Auncel* defendant, to try an issue of not guilty joined between them upon a bill of trespass commenced in *Trinity Term*, 38. *H.* 8. and note, that the bill does not suppose the defendant to be in the custody of the marshal: *quære hoc.* And there was no continuance from the time of the death of the said king, nor any re-attachment sued: and, Whether this was a discontinuance because it was by bill? was moved as a doubt. And by the opinion of the Court in 10. *E.* 4. [13. b.] at the restoration of *H.* 6. [*M.* 49. *H.* 6. pl. 1.] it is necessary to sue out a re-attachment: and see in *T.* 20. *H.* 6. [42. pl. 19.] the contrary; but that was a bill of † *deceit* brought in the bench by an attorney by privilege. And the defendant imparled, and there was no continuance to another day, *ideo quære inde.* But the truth of the case was otherwise than is above reported, for they had a re-attachment upon the file of the next Term after the king's death sued out against the defendant, and a *habeas corpora* against the jury by a precept to the sheriff of *Middlesex* only, without any writ, and without the *teste* of the Chief Justice. And yet that was holden good enough in that court, and their common practice there; and also that the defendant need not be in custody of the marshal, when the action there is laid in *Middlesex.* Note this.

† Orig. dette.

* [118. b.]

* Hawley against Barber in Error.

"Men cannot have their
"cattle going upon the
"common, but I. B. and
"his children will kill

(79) **B**ARBER brought an action upon the case against *Hawley* for slander, s. for these words, "*John Barber and his children be false thieves: men cannot have their*"

"their cattle going upon the common, but they will kill them
 "and eat them: William Bolt missed nine sheep, and by God's
 "b—— he hath killed them with his dogs and eaten them in
 "his house: they be naught, they be naught, all is fish that
 "cometh to net." And the defendant justified other words
 without this that he spake the afore said words, &c. And it
 was found by the jury, that he spake these words, to wit,
 "Men cannot have their cattle going upon the common but
 "John Barber and his children will kill them with Barber's
 "dogs;" and as to the other words he did not speak, &c. and
 assessed the damages at four-pence, and costs at six shillings
 and eight-pence. And upon this verdict judgment was
 given in C. B. and for this a writ of error was brought,
 and the error assigned only in this matter, &c. because the
 words found by the verdict are not sufficient to maintain the
 action, &c. And for this cause the judgment above was
 reversed, which note Michaelmas Term after.

"them with B.'s dogs" are
 not actionable words (a).

4. Co. 18. b.

4. Leon. 121.

Dyer, 75. a.

[Bul. Ni. Pr. 5, 6 a.

Black Rep. 791. Cowp.

276. 5. Burr. 2698.]

(a) "He is a bad man, he bought nails of
 James Graham that were stolen out of Greve's
 "yard, and I can prove it;" are not actionable
 words, unless coupled with special damage;

no innuendo that he knew them to have been
 stolen is sufficient without it. *Duncan v.*
Lippard, Guild. Sit. ass. Trin. 1896 G. 3. B. R.
coram Lord Kenyon, MS.

Michaelmas Term,

2. and 3. Philip and Mary.

Thrower against Whetstone.

(1) DEBT was brought by one *Thrower* against *Whet-*
stone, haberdasher of London, in the exchequer, upon
 a bond for one hundred pounds made to him by the name of
Robert Thrower warden of the gaol of *Ludgate*, in which
 bond *Whetstone* with another surety was bound for one *Whit-*
ington, and he himself was also bound with them, (which
Whittington was prisoner there upon a *capias utlagatum* in
detinue). And the bond was indorsed with divers articles, s.
 for the safety and discharge of the obligee, and for the pay-
 ment of the charges and fees of the prisoner, and for the
 rendering of his body to prison at all times upon a sum-

To debt against a surety
 on a bond given by a
 prisoner in *Ludgate* and
 himself conditioned to
 save harmless, and dis-
 charge fees, and render
 his body at any time,
 plea, conditions performed
 generally, is bad.

Whether the Court are
ex officio bound to take
 notice of such bonds
 being made in other
 form than is prescribed
 in 23. H. 6. c. 9. the
 defendant not having
 pleaded it? *qu.*

Dy. 25. 323, 324. 364. a.
Plow. 62. Hob. 14.
Styles, 234. 4 Co. 77.

[1. Lev. 303. Keil. 95. b.
1. Sid. 215. Cowp. 578.]

3. Cro. 245.
Plow. 66. b. Co. 4. 76. b.
37. H. 6. 1. b.

[1. Term Rep. 418.]

22. El. 364. a. 4. E. 4.
70. a. 15. El. 324. a.
Plow. 60. 69. 65. a.
379. 231. a.

Dyer, 85. a.

[Doug. 97. Bull. Ni.
Pr. 224. 2. Term Rep.
569. 4. Term Rep. 504.]

mons, &c. and other points which are comprised in the statute 23. H. 6. c. 10. [9.] concerning bonds to be taken by the sheriff, gaolers, and other officers, &c. And the defendant demanded oyer of the bond, and of the indorsement, and had it, and pleaded in bar conditions performed, and for the insufficiency of the * plea the plaintiff demurred in law. (2) And the truth was, that the plea was faulty and insufficient, but the defendant would take advantage of the statute which avoids bonds made in other form than is limited by the statute aforesaid, because the act is general, and therefore the Court is bound *ex officio* to take notice of it, although it be not alleged by the party. And, Whether the Court is bound to do this, or not? was now all the material question in the case. Note, in the case above the gaoler was not bound by the statute to take bond and sureties, although it were offered and required, because *Whittington* was not bailable by the statute, for he is comprised within the exception which extends to seven persons, and an outlawed person is one; wherefore, &c. (3) Also the intent of the statute is, that the bond of prisoners being in ward by course of law ought to be made to the sheriff or other officer himself, and by the name of his office, and with condition to appear at the day and place contained in the writ, bill, or warrant: and if it be made in any other form, it is void. But *quære*, Whether the obligation made in another form be void as well against the sureties as against the principal, or not? Because the words are *of any person, or by any person which shall be in their ward, &c.* whether the words *of any person* shall be intended generally, as well of those who are at large as of the prisoners? But it seems to me, that the plaintiff shall recover, and the Court is not bound to take notice of the statute, because it is not general, but particular in generality: for it only avoids obligations made in one sort to the sheriff and other officers by prisoners and persons arrested. (4) As in the case of *Lord Saye* in 13. E. 4. [8. b.] where it was enacted that all corporations and licenses granted and made by H. 6. should be void, the Court was not bound to take notice of this act, if it was not specially pleaded by the party who would take advantage of it, any more than of the private or particular act of a private person: otherwise is it, where it is universal and concerns all the subjects, for that makes a common law, whereof the Judges are bound to take notice.

notice. Also *quære*, Whether the barons of the exchequer are as Judges of the common law in this case of debt by a subject privileged in the court? The law is the same of a general pardon, the Judges are bound to take notice of it, but not of the pardon of a particular person, &c. (5) And it is not like the case of 10. E. 4. [7. a.] where the lord distrained the beasts of the lessee for years of his very tenant for rent and services arrear, and the termor brought trespass for it, and he pleaded this in justification: and the termor replied, "*riens arrears*,"* and found for him by verdict; yet *ex officio* the Court would not give judgment for the plaintiff, because it is against the statute [of *Marlebridge*, 52. H. 3. c. 3.] *Non ideo puniatur dominus per redemptionem, &c.* The same is the law of an appeal brought by a woman of the death of her father, although the defendant admit the appeal, the Court ought not to suffer the plaintiff to have judgment, because the statute [of *Magna Charta*, c. 34.] is in the negative, *Nullus capiatur in appello, &c.* Also in 13. E. 3. in a writ of right, the demandant counts of the seisin of his ancestor in the time of king H. 1. when it should be after the time of Richard 1. by the limitation [of *West.* 1. 3. E. 1. c. 39.]; and the tenant admits this, and pleads, and it is found against him; yet the Court will not give judgment for the plaintiff, because the statute is, "*no one shall presume to declare of a seisin bigger, &c.*" (6) Also, where it is in matter apparent to the Court by the pleadings, that the plaintiff or demandant has no cause of action, although the party defendant or tenant is estopped by confession or verdict, yet the Court shall not proceed to judgment, as in the case of *Tilley and Wody*, 8. E. 4. [7. E. 4. 31. a. pl. 18.] but those cases differ much from this case, for the Court here is not bound to take notice that the plaintiff was ever warden of the gaol of *Ludgate*, but this ought to have been expressly averred by the defendant to avoid his bond: for the plaintiff *Thrower* sued this action, as appears by the record, by the name of *Robert Thrower*, servant of *Roger Cholmeley*, knight, chief baron, &c. otherwise called *R. Thrower*, citizen and wax-chandler, *London*, and keeper of the gaol of our lord the king of *Ludgate*, so to agree with the specialty he is named gaoler in the *alias dictus* only. (7) And it may be well intended that those words were false and superfluous; as an obligation made to *I. S.* son and heir of *G. S.* when in truth he is a bastard, or as the book [9. E.

28. H. 8. 27. b.

26. H. 8. 7.

[2. Hawk. Pl. C. 560.]

1. Co. 66. Plow. 66.

84. b. Diet., 13. a. 76. a.

* [119. b.]

Stat. Merton, c. 3.

27. H. 8. 9. Lit. 170.

2. Rol. Ab. 269.

Bridg. Rep. 67.

West. 1. c. 28.

34 H. 6. 43. a.

Dyer 76. a.

8. 11. Co. 133. 52.

Plow. 264. Fit. Judgment;

50.

1. Cro. 174. 11. Co.

26, 27. Ante, 50.

1. E. 4. 1.

Plow. 81. Perk. 40.

32. H. 6. 31. Cro. 19.

9. H. 5. 5. 7. H. 4.
23. 48. E. 3. 12.

Plo. 76.

[1. Term Rep. 418.]

1. 2. 4. 5. b. Plo. 62.
68. 69. Fit. Debt. 80.
Bro. Non est factum 14.
R. 611.

* [120. a.]

3. 5. Co. 59. 119.

Dr. and Stu. 133.
1. E. 3. 7. b.

4. 29. b.] is, a woman was bound by the name of *Alice S.* wife of *I. S.* and in truth she was a widow, or *contra* if she be called widow while she is a *feme covert*, &c. these words are only nugatory, so here; and then it is indifferent to the Court to understand whether *Thrower* was warden or not, although he be so called in the specialty: and then it is no more than that a prisoner of *Ludgate* is bound to one by such a bond as above, who in reality is no officer, and then this bond is good, and shall never be avoided by the statute 23. [*H. 6. c. 9.*]; for the statute is, where an obligation is made to the officer, and by colour of his office, &c. so it ought to be expressly alleged in pleading, that the plaintiff was an officer at the time of the making of the said writing, and so are all the cases which are reported in our books, where such bonds are sued. (8) For in 37. *H. 6.* [1. a. pl. 7.] there is a notable case where such a bond was sued, and void by pleading the statute, because it was single and without condition, which is contrary to the form expressed in the statute. And in * 7. *E. 4.* [5. pl. 15.] such a bond was avoided, because it was made to another person than to the sheriff, which is also contrary to the statute, for it ought to be made to the sheriff himself. And in the case of *Dyke* now lately in *C. B.* the statute was pleaded to avoid the bond, but the question of the denurrer was, how the conclusion of the plea should be, *s.* Whether it should be with an *issint voida*, and not with *judgment si actio?* and that is also the doubt in 7. *E. 4.*; wherefore, &c. (9) Also, for another reason this case is out of the statute, for the statute is, that the prisoner should be in ward and prison by the course of the law; and it appears by the plea here, that the said *Whittington* was outlawed at *Nottingham* on such a day and year, at the suit of such a one in a plea of detinue, and that afterwards he was taken and arrested at *London*, and committed to the custody of the defendant, where it should be of the plaintiff; and it does not shew by what authority he was arrested, nor by whom, &c. And then it shall be intended most strongly against the party pleading, *s.* that he was arrested tortiously, and not according to the course of the law, as the statute is; wherefore, &c. For it was not lawful for any man to arrest the party outlawed in this personal action without a writ of *capias utlagatum*, but for felony it is otherwise, &c.

Richard Reade *against* Rochforth and Others.

(10) **RICHARD** Reade, brother and heir of Gerard Reade, brought appeal of death against six, *s. A. B. C. D. and E.* as principals, and *F.* as accessory: and three of the principals and the accessory appeared; and the plaintiff counted against them with a *simul cum*, the other two principals being absent, but upon no indictment, and against the accessory for procurement and abetment. Two of them and the accessory severally pleaded not guilty, whereupon the plaintiff was at issue with them; and the third principal pleaded not guilty, and ready to defend it with his body, and waged his battel thereof against him. And upon this plea the plaintiff demurred in law; and several *venire facias*'s were awarded to try the pleas of the others, *sed cesset processus inde* against the accessory until all the principals are legally, by some means, convicted of the principal fact. And in the mean time they were severally delivered to bail. And afterwards the demurrer in law was adjudged against the plaintiff, wherefore he was barred of his appeal against him who waged battel, and that he should go without day. And one of the two principals who did not appear was returned dead, and the other outlawed. And afterwards, the two principals who pleaded to issue with the plaintiff appeared at *nisi prius* in Northampton, and the jury being charged returned to give their verdict, and the plaintiff was nonsuited there; and upon this at both their requests, according to the statute [West. 2. c. 12.] the jury was charged *de bene esse* to inquire of the damages sustained * as well by reason of the appeal as of the infamy and imprisonment, &c. And they assessed damages for them severally; and they were also charged *de bene esse* whether the plaintiff was sufficient for the damages, and if not, who were the abettors: who found that he was not sufficient, and also who were the abettors by name, *s.* that they procured, instigated, and abetted the said plaintiff to take and prosecute the said appeal in the form aforesaid, and they did not say (out of malice.) Note this.

(11) And another jury at the same time was charged at *nisi prius* against the accessory, but the record is not that they were elected, tried, and sworn, but charged by the Court, and when they returned to give their verdict, the plaintiff was again non-suited: and the jury were charged at the request

In appeal of death the defendant may join issue by battel. [Cro. Eliz. 69.] And so one may, though another plead to the county in the same appeal. [Cro. Eliz. 69.]

Where the defendant in appeal is acquitted, the justices at *nisi prius* have power to inquire of the damages, and whether the plaintiff be sufficient, and if not, who are his abettors.

The defendant in appeal having tendered his battel, and being discharged by demurrer in law, shall yet be arraigned at the suit of the king.

The principal on a nonsuit in appeal, but who makes default on the indictment at the suit of the king, is not *legitimo modo acquietatus*, so that the accessory shall have process for his damages.

Upon a nonsuit in appeal against principals and accessory, the defendants being afterwards indicted and acquitted, and damages assessed each time, the accessory shall have his process upon the last only.

* [120. b.]

Wid. post. 131. a. pl. 72.

West. 2. 13.

[Cro. Car. 532.]

Dal. Rep. 43. 38.

22. E. 4. 19. b. Stamf.

168, 164. a. Pl. 100. b.

Pl. 99. b. 7. H. 4.

36. a. Stamf. 47. 153.

3. R. 3. 21. b. Cro.

107. pl. 23. 6. H. 4.

3. E. 2. Inst. 420.

[Fost. C. L. 126, 127.

2. Hale, Pl. C. 41. 2.

Hawk. 289. 290. See

Strange, 856, 857.]

Stamf. 170. a.
Co. Magn. Charta, 386.

4. Co. 40. a. Dal. Rep.
38. 44.

[2. H. H. P. C. 41. 6.
Mod. 219.]

8. H. 5. 7. Plo. 99.
contr. 40. F. 3. 42.

9. Co. 117.

4. Co. 93. b.
[2. Hawk. 289. 2. H.
H. P. C. 41.]

8. H. 4. 22. a. Dier,
99. Bro. Nisi Prius, 27.

Plo. 169, 170. a.

of the accessary *de bene esse* to inquire of the abettors as above, and it was done. And afterwards at the day in banc, judgment was given, that the plaintiff take nothing by his writ of appeal, but for his false claim thereof be taken, and his pledges in mercy, and that the said three as to the suit of the said plaintiff should go without day; but as to the suit of the king, &c. they were severally arraigned, and pleaded again severally not guilty. And because formerly (as appeared by the record) one of the principals was outlawed, and another dead, the accessary was brought to his trial at the suit of the king, and one of the principals also; but the other made default, wherefore a *capias* was awarded against him and his mainpernors; and by several juries taken between the king and them, they were acquitted: and it was again prayed that the jury might inquire of the damages and of the abettors, who were found as above. And *quære*, Whether the accessary shall have process against the abettors before the acquittal of the other principal who made default, because he was not as yet lawfully acquitted? And the Court were of opinion, that he was not lawfully acquitted as yet. (12) And it was also well debated, Whether the Judges of *nisi prius* have power to inquire of the damages, where the defendant in appeal is acquitted? and also, Whether the plaintiff be sufficient to pay damages? and also of the abettors; since the statute West. 2. c. 12. is, that *the Justices before whom the appeal was commenced and terminated shall do it, &c.* And at length precedents were shewn in *B. R. s. in Hil. Term, 10. H. 7. Rot. 38. and Mich. 19. H. 7. Rot. 27.* that the Justices at *nisi prius* had done it, and certified the *posita* in banc. And see 10. Ed. 4. fol. 14. b. under a *nota*, That they have no power at *nisi prius* to give judgment of damages by statute 14. H. 6. c. 1. And see the opinion of FAIRFAX 22. E. 4. fol. 18. [19. a. pl. 44.]

(13) And afterwards in *Hilary Term* following, a *scire facias* was awarded against the abettors for the damages, into the county of *Northumberland*. And note, by the opinion of PORTMAN, *Chief Justice*, * the said principal who tendered trial by battle, and was discharged by demurrer in law, shall be arraigned at the suit of the king because he is not yet acquitted; and for this see two precedents, *s. M. 14. H. 7. Rot. 76. and Trinity* in the same year, *Rot. 74.* The defendants in appeal pleaded not guilty *per patriam*, and the plaintiff

* [121. a.]

[6. Mod. 219.]

4. Co. 45. Stamf. 147.
144. 148. b.

plaintiff demurred thereto, and adjudged a good plea, whereupon the defendant was acquitted, and let to go thereof without day as to the plaintiff; and as to the suit of the king he was again arraigned, and pleaded the same plea, and this was confessed by JAMES HUBBERD, *Attorney General*, by special warrant of the king, which was signed with his sign manual, and entered in the pleadings *verbatim*, and thereupon the defendants went without day, &c. And upon this opinion of PORTMAN, the said principal who waged battel was arraigned anew at the suit of the king, and pleaded not guilty, and his plea was confessed to be true by the attorney general, who had the warrant from the king and queen to do this, which was entered *in hæc verba*, upon which the party had judgment of acquittal; and thereupon the accessory brought a *scire facias* against the abettors. See more at this mark § 7 [fol. 131. pl. 72.] *postea*.

17. 27. 47. Aff. 25. 25.
7. 7. H. 7. 5.

2. Inst. 385.

[2. Hawk. 289.]

Lord Mounteagle against the Countess of Worcester.

(14) LORD MOUNTEAGLE brought an action upon the case against the countess of Worcester, supposing by the writ and count, that whereas he was possessed in trover for a chain which the defendant knowing, &c. sold, &c. and the money, &c.

(14) *Hil. 33. Eliz. [Vandrink v. Archer, 1. Leon. 221.]* In an action upon the case for trover and conversion, *ready and always has been to deliver* is no plea: otherwise is it in detinue; for there the thing itself is to be recovered.

E. 36. Eliz. B. R. & Taylor brings debt against *Lilly* upon a bond, &c. conditioned that *L.* should not challenge or claim any copyhold land which was the land of the said *L.* He pleaded that he had not claimed any land. The plaintiff replied, that defendant had entered into one acre of copyhold land, &c. and concludes, "*and this he is ready to verify*:" and a special demurrer was thereupon entered, and found for the plaintiff. COKE moved in arrest of judgment, that the conclusion of the replication should be, "*and this he prays may be enquired of by the country*," and that this is matter of substance, and not aided by the special demurrer, as a matter of form would be, and cited *Dyer*, 31. pl. 218. and 27. *H. 6. 10.* that a plea is not good without a conclusion; to which CLENCH and FENNER agreed, but GAWDY and POPHAM *contra*, and that it is a matter of form only. And by GAWDY, the plea is good without conclusion. And he cited *Dyer*, 134. [pl. 11.] But this case of *Dyer*, fol. 121. was not recollected. See for the conclusion of pleas, 9. *H. 7. 2. b. 3. a.* Bro. Pleading, 135. 36. *H. 6. fol. 17. 1. H. 7. 13. pl. 27. 11. H. 7. 23. pl. 27.* that the omission of the conclusion is not amendable.

This plea by POPHAM was denied to be a good plea, because he ought to conclude, "*and of this he puts himself upon the country*," and [not] to aver his plea, and demand judgment *si assit*, because this is no plea in bar, but the general issue. Bend. 41. pl. 73.

Kinnerly v. Barnard [Cro. Eliz. 554.]. In an action of trover of goods, and selling them to persons unknown, the defendant pleaded that he distrained them damage feasant, without this that he sold them; but adjudged no plea, for he ought to have put it upon the general issue.

M. 37. and 38. Eliz. C. B. adjudged upon long argument, that in actions for trover and conversion, the conversion is not traversable, and therefore it is not necessary to allege the time or place of the conversion, but the plaintiff may count that on the first of May he was possessed of the said goods, and casually lost them, and that afterwards they came to the hands of the defendant, and he converted them. So it was adjudged, *M. 22. Jac. B. R. Trin. 15. Jac. B. R. Rot. 199.*

converted, &c. traverse that the defendant did not sell, &c. concluding with a verification, is bad.

[Be. 141. pl. 73.] } S.C.
1. And. 20.
2. Leon. 99.
2. Rol. Rep. 63.

27. H. 8. 13. a. 39.
H. 6. 2. a.

20. H. 7. 4. b.

[Bul. Ni. P. 48, 49.
Salk. 290. and 9th to the stat. of Limitations. 1. Com. Dig. 224.]

Dy. 89. Bro. Action sur le Case, 109.

* [121. b.]

a. H. 4. 25. 2. H. 6.
39. b. 21. H. 6. 29,
30. 7. 2. 2. E. 3.
Stath. Tr. spaf. 91.
M. 4. Jac. Cro. 130.
307. 21. H. 6. 39. b.
2. H. 8. 3. 10.

[2. Vent. 174. 2.
Hale, 183. 2. Hawk.
333.]

Dy. 66. b.
33. H. 6. 26.
7. H. 4. 44.

of a chain of gold, of the price of one hundred marks, as of his proper chattels, and being so possessed thereof at *London* in the parish, &c. casually lost the said chain, which afterwards came to the hands and possession of the said countess at *London* in the parish and ward aforesaid by finding, and the said defendant, knowing that the said chain was the chain of the said plaintiff, but contriving subtilly to defraud and deceive the said defendant of the same, there sold the said chain to divers persons unknown to the said defendant for divers sums of money, and received the money for the same, and converted it to her own use, &c. and declared in certain the days of the loss of the said chain, &c. and the defendant traversed the selling, s. that she did not sell the said chain in manner and form as by the writ and declaration is supposed, and this, &c. and did not conclude, *and of this she puts herself upon the country, &c.* and upon this plea the plaintiff demurred in law. (15) And ROCKEY thought it was no plea, but that the issue should be *not guilty*, which answers to all the misdemeanors supposed in the writ and count: and also that it was only argument, and that the defendant ought not to have concluded her plea, *judgment si actio*, but have put herself upon the country; because it is a direct negative and traverse to the affirmative supposed by the plaintiff, and also it seems the plaintiff was at his election * to have this special action upon the case, or an action of detinue, because there a misdemeanor is supposed. And I think the contrary; and first that the form of the writ and count is not good by reason of the word "*price*," where it should be to the "*value*," because it is a dead chattel; but if it had been a live thing, as an horse, it would have been otherwise, and so there is a difference. In trespasss for live chattels the writ is, "*took and led away*;" but for dead, "*took and carried away*." And so is the Register: but as to the first point, 17. E. 3. [41. a. pl. 19.] and F. N. B. [199. L. M.] in trespasss, agree that either form is well enough. (16) Also it is, that being possessed of the chain he casually lost it, which seems to me, *quasi impossibile*, because there is no distance of time, &c. *tamen quære inde*. Also he has supposed fraud

(16) M. 36. H. 6. Rot. 9. *Ex parte rem. Reg.* in the exchequer [35. H. 6. 25. b. pl. 33.] an information was exhibited by *William Grimsby*, treasurer of the chamber of the king, and keeper of the jewels, against *Simon Eyre*, citizen and alderman of *London*, because certain jewels of the said king came to his hands. The defendant pleaded the custom, and that they were pledged, and that the king's mark was not upon them, and found for the king.

and

and deceit in the defendant, where it appears she came by the chain by trover, and so without any delivery or privity, and no confidence, credit, or trust was between them before; wherefore, &c. Also an action on the case will not lie, because it appears that the plaintiff may well maintain an action of detinue, and where a man has an ordinary writ ready framed in the Register for his case, there he shall not sue out a new form of writ, &c. And here nothing is alleged whereby the writ of detinue is altered in its nature to an action upon the case; for no property is changed by the sale, because it was not made in market overt; for although *London* has been holden by prescription to be a market overt every day, yet that ought to be specially alleged. (17) And see 18. *E.* 4. [23. pl. 5.] and 5. *H.* 7. [15. b. pl. 6.] for trespasss of boots, slippers, and shoes, seized by the owner of the leather whereof they were made, because it could be known, &c. Also there is no privity destroyed here, as in the case of sheep drowned by the negligent custody of the shepherd, 2. *H.* 7. [11. a. pl. 9.] And in the case in *Littleton* [§. 71.] of a lessee at will, who voluntarily pulls down his house; and 15. [12.] *E.* 4. [13. b. pl. 10.] where the bailee of an horse kills him, trespasss general lies notwithstanding the bailment. (18) And as to the traverse of the sale, it is well enough, for that is all the force and substance of the misdemeanor of the defendant: and although it was only a conveyance, yet, because the defendant is prevented from waging her law, she may traverse the conveyance without answering to the point of the action. So in debt upon a lease for years, *non demisit* is a good plea if it be of land, but it is otherwise of sheep in 1. *H.* 6. [1. a. pl. 3.] So debt upon arrearages of an account before auditors, he may say *non computavit*; and in debt against the sheriff for the escape of one who was in his prison in execution, *non permisit ire ad largum* is a good plea: and this diversity is agreed in 8. *H.* 6. [5. b. pl. 13.] (19) Also the defendant in any case of misdemeanor may say generally * not guilty, or traverse the point of the writ, as *ne forgea pas, non ejecit, non rapuit, non manutenuit, &c.* or *not guilty of, &c.* Then as for the conclusion of the plea, it seems good enough, although it would have been a better form to plead as *ROCKBEY* has said. But a good issue may well

2. Cro. 50.
4. Cro. 52. 14. H. 8.
31. Dyer, 99. b.

[2. Str. 1187. 1. Will.
8. 2. Term Rep. 750.
Douglass 380.]

5. Co. 83. b. 84.
35. H. 6. 2. 12. H. 8.
9. Dy. 27. 3. Cro.
783.

5. Co. 13. b.

Lit. 15. a. 22. E. 4.
5. b. 20. H. 7. 4.
3. H. 6. 5. 2. H. 7.
12. b. 3. Cro. 555.

48. E. 3. 6. a. 7. R. 2.
Ley. 41.

[5. Com. Dig. 261, 262.
Bul. Ni. P. 170. 2.
Will. 218.]

10. E. 4. 10. b. 10.
El. 278. b.
Plow. 35. 144.

* [122. a.]

Dy. 86. 111. 20. H. 7.
14. 2. E. 4. 6. 8.
H. 6. 11. 36.

well be joined on this plea, if the plaintiff would have replied that the defendant did sell, and so maintained his writ and count, &c.

Afterwards it was adjudged no plea in bar, but that it ought to have concluded, and of this she puts herself upon the country, omitting the verification, and judgment *fi adio*. Benl. Rep. 41. pl. 73.

Rickman and his Wife against Gardener.

Devise to A. his youngest son and his heirs for ever, and if either of his two sons should die without issue, that then it should remain to his daughter in fee, A. dies without issue in the life of the testator, the daughter shall have her remainder.

(20) A MAN seised of land in fee had issue two sons and one daughter, and made his last will and testament in writing after the statute, &c. and thereby devised his lands to his wife for the term of ten years after his death, remainder to his youngest son and his heirs for ever, and that if either of his two sons should die without issue of his body lawfully begotten, that then the land should remain to his daughter and her heirs in fee; and afterwards, s. in the life-time of the testator, the said youngest son died without issue, and then the father died, without making any alteration of the will: Whether the eldest son shall have the land as tenant in tail, or in fee-simple by the intention of the devisor, or the daughter? was the question. And it was upon a demurrer in law in waste by Rickman and his wife against Gardener. And by the opinion of all the Judges of C. B. this was a good remainder to the daughter, notwithstanding the death of the devisee without issue in the life-time of the testator, and they would not argue the case. See Perkins accordingly in Devise, fol. 120. [f. 246. §. 568.] where the case is, A man devised his lands to one for life, remainder over in fee; the devisee for life died in the life-time of the devisor, and then the devisor died; he in the remainder may well enter and execute his remainder. But see *contra* in this matter, E. 7. Eliz. fol. 237.

Plow. 158. a. 521.
541. 19. H. 8 4. a.
19. El. 354. a. 357. a.
19. H. 6. 74. 1. 9.
H. 6. 24. Dy. 124.
304. 117. 127. 15.
Jac. Cro. 428.
13. H. 7. 17. b. 1.
El. 171. a.
16. El. 331. a.
[See Brett v. Rigden,
Plow. Com. 341. with
the books cited in the
margin, and Dougl.
337.]
Perk. 109. a.
Plow. 414.

M. 37. 38. Eliz. Fuller v. Fuller, adjudged [Cro. Eliz. 422. 1. Eq. Ca. Ab. 215, 216.] accordingly, that he to whom the remainder is limited should have it, although the particular devisees died in the life-time of the testator, so that there was no particular estate. Ent. Hil. 30. Eliz. Rot. 586.

Wyat's Case.

(21) *SIR Thomas Wyatt* the father, in consideration of a marriage between *Thomas Wyatt* his son and heir apparent and *Jane* the daughter and heiress of *Sir William Howtry*, knight, enfeoffed one *I. S.* in fee, and took back an estate to himself for term of his life, remainder to the said *Thomas* the son, and his said wife that was to be, and the heirs of their two bodies begotten, remainder to the right heirs of *Sir T. W.* the father; and afterwards the marriage was celebrated; and then the father exchanged this land with king *H. 8.* for other lands in fee, and levied a fine to the said king *sur connissance de droit come ceo que, &c.* in fee, and bound himself and heirs to warranty; and the king enjoyed it all his life, and died seised; and so did king *Ed. 6.* and then it descended to the now queen, and the warranty to the said *Thomas Wyatt* * the son in the time of king *H. 8.* And now in the time of the present queen, *T.* the son was attainted, and drawn, hanged, and quartered for high treason and rebellion, and had divers issues yet living by his said wife, who is also now living, and has sued the now king and queen to have restitution; and it is all granted, and in the patents of restitution all the case above is recited, (22) and by the words "*we give, grant, render, and fully restore*" the land to the said *Jane* without any limitation of estate; but a tenure by knight-service, as of the manor of *Greenwich*, is reserved, and not *in capite*. And, Whether the issue are inheritable to the tail aforesaid? will be the question after the death of the said *Jane, &c.* and *valeat quantum valere potest, &c.* Note, the collateral warranty at one time descended upon *Thomas* the son, wherefore he was barred from demanding his remainder above. Also note the fine with proclamation. Also note *Colte's* assise [5. *H.* 7. 30. b. pl. 12.] for the disability in the father, through whom the descent and conveyance must be made. And note in the case above the queen had granted the land to *Captain Matstone* in tail, by a former patent; wherefore there was a dispute between the said *Jane* and *Captain M. Mich.* 3. and 4. *Pb. and M.* whether the said *Jane* had a right in remainder to the whole, or only to a moiety; and whether she might enter upon the patentee in tail of the queen without suit to her, &c.

Tenant for life, remainder to his son and his wife *that shall be* in tail, after the son's marriage levied a fine to the king with warranty; after attainder of the son who had issue, the king granted the estate to a stranger, and afterwards restored the wife: Whether the issue shall inherit after her death? Whether she has right to the whole, or a moiety only? and, Whether she may enter upon the patentee without suit to the king? *q̄.*

3. El. 190. b.
Lit. 733.

* [122. b.]

Lit. 725. B. N. C. 67.
3. Co. 79. 8. Co. 41.
72. 91. 2. E. 4. 46.
Dyer, 351, 352. 5.
H. 7. 33. a. 16. 22.
332. b.

[Ambl. Rep. 649.]
Dy. 101. a. 142. 139.
4. E. 4. 25. b. 1. 4.
9. Co. 101. 59. 140.
21. H. 7. 2.
[4. Vin. Ab. 169.]

Martaine *against* Hardy.

Nl habuit in tenementis may be given in evidence on *non demise* pleaded to a parol lease for years.

[Bul. Nl. Pr. 170. 177. 5. Com. Dig. 260, 261. 2. Wilk. 211. 218.]
Dy. 31. a. 112. a. 183. a. 187. a. Lit. 12.

18. a2. H. 6. 37. 8. 20. Cro. 61. 42. E. 3. 16. 5. 19. a.

(23) NOTE, In evidence to a jury between *Martaine* and *Hardy*, upon a traverse of a lease for years by parol, *s. without this that such a one did demise*, it was said, that he might say *the lessor had nothing in the land at the time of the demise*. And at first the Court were in doubt of this, but at length they thought it good evidence: for in formedon, if the tenant traverse that the donor had any thing in the land at the time of the gift, such issue is not allowed, but he must say *non dedit, &c.* See *T. 43. E. 3. [19. pl. 3.]* in intrusion brought by the heir upon a lease made by his ancestor, the tenant traversed that the ancestor had ever any thing in the land; and this was holden a good plea; and the demandant maintained the seisin of his ancestor and his lease also, but the jury shall be charged upon the seisin only.

Though a traverse be tendered to an indictment for a forcible entry, it is still in the discretion of the Court to stay or grant restitution, according to the truth of the title.

* [123. a.]
1. Rol. Ab. 262. contr'.
Benl. 23.
[1. Hawk. P. C. 289. 292, 293.
Cal. Temp. Hard. 174.]

(24) NOTE, In *B. R.* it was holden by the opinion of the Court, that notwithstanding a traverse tendered to an indictment for a forcible entry, upon the statute 8. *H. 6. [c. 9.]* they may grant or stay the writ of restitution at their discretion, according as the truth of the title appears to them: for * there are precedents both ways; which note. Also see a *superfedeas* to stay restitution granted by other Judges than, &c. *M. 2. and 3. Eliz. fol. 187. a. pl. 6. post.*

(26) But at this day it is a good plea for stay of restitution to say, that the party has been in possession for three years before the day of the indictment by statute 31. *Eliz. c. 11.* and the clerk of the peace upon such traverse tendered may grant a *superfedeas* to stay restitution.

Sir James Granado *against* Dyer.

Hil. 1. Mar. Rot. 84. B. R.

A lease made by a prior and convent before 31. *H. 8. c. 13.* reserving usual rent at two several Feasts in the year where the first payment is not

(35) THE Prior of *Plumpton* and his Convent, by indenture bearing date the first day of *October, 30. H. 8.* demised and granted to *Dyer* a tithe of corn in *Cires Newton* for the term of twenty-five years, yielding and paying therefore

fore yearly to the Prior and his successors fifteen pounds at two times of the year, *s.* at the Feast of the *Purification of the Blessed Mary* and the *Invention of the Holy Cross*, or within six weeks next after each of the said Feasts, by equal portions, the first time of payment thereof to begin at the Feast of the *Purification* which then should be in the year of our Lord 1539, which was *Candlemas* one year after the lease commenced; and afterwards, *s.* on the first day of *March* in the said 30th year of *H. 8.* the priory, with all its possessions, was surrendered and granted to the King by deed inrolled, and on the 28th day of *April* then next following, which was in the 31st year of *H. 8.* the parliament commenced, and continued until the 28th day of *June* then next following, in which parliament it was enacted, "*that if any abbot, prior, &c. hath made any lease or grant for term of life or years of any manor, tithes, &c. upon which leases and grants the usual and old rents and fermes accustomed to be yielded and reserved by the space of twenty years next before the first day of this present parliament is, or be not, or hereafter shall not be thereupon reserved and yielded, that then such leases and grants shall be void, &c.*" 36. The question is, Whether the lease above be void, because no rent is reserved the first year to be paid? And it seems not, because the words of the statute are observed in the lease above, and also no profit of the lease is to be taken before the two first days of payment, and also the King is not deceived, &c. And in the *Easter* Term following the Judges argued the case, and they, *s.* DALISON, WHYDDON, and PORTMAN, were all of the same opinion, that the lease was good, and not within the restraint and proviso of the act to defeat leases, because the act in this case ought to be taken strictly; for by the general saving before, all leases and interests were saved, and the proviso which restrains that should not be taken favourably; and because this word "*yearly*" is wanting in the act, the words of the statute are well observed in this case; and by WHYDDON and PORTMAN, if the ancient rent reserved be released afterwards by the Abbot, so that the termor * be discharged during the whole of the term by matter after the reservation, yet the lease shall be good, and not defeasible by the statute. And PORTMAN held, that in the case above the lessee was debtor to the King, or to the Abbot if he continued for the first year, although the day of the first payment

to be made till one year after the commencement of the lease, is not void under that statute.

Dalt. 28. Rol. Contin. 171. 174. Inst. 27. a.

31. H. 8. c. 13.

Dy. 73. Com. 102.

5. Co. 2. 6. Co. 37. 5. Co. 6. a.

8. E. 2. 46. a.

6. Co. Dean and Chapter of Worcester. Bro. Condition, 6. 27. H. 8. 6. 5. 6. Co. 5. 38.

Dyer, 304. a.

* [123. b.]

10. Co. 128. 2.

ment does not commence before the second year, for the debt is not discharged although the payment be deferred, for the reservation of rent was yearly, &c. and this makes the lessee a debtor the first year: but DALISON and WHYDDON *à contra* as to this.

Whether a feoffment made by a bishop, confirmed by a dean who was elected in the room of one attainted of treason by parliament, and by the chapter, binds the succeeding bishop after the attainer reversed, he never having been deprived by sentence?

Roll. Contin. 341. 2. Roll. Rep. 102, 103. Dy. 245. b. 233. 9. E. 4. 11. b. 11. H. 6. 29, 30. 19. H. 6. 13. a. Abbe, 19. Co. Litt. 300. b. 5. 9. Co. 102. 18. 35. H. 6. 35. Dy. 108. a. 273. b. 289. 9. H. 6. 33. b. 11. Eliz. 282. b. Lit. 121. a. 4. 10. H. 7. 10. 22. 28. E. 3. Same case. 15. E. 3. Petition, 2. 28. H. 8. 24. 11. H. 7. Lib. Intr. Quare Imp. 480.

(37) **B**ISHOP, Dean, and Chapter of *Exeter*. And the Dean (who was *Reginald Pole*, now cardinal and legate *à latere*) was attainted of treason by parliament 31. H. 8. and another, *s. Dr. Haynes*, elected dean; and afterwards the Bishop made a feoffment of certain land of his bishoprick in fee; and the said *Haynes*, the Dean, and the Chapter, confirmed the same. And afterwards, in the second year of the now queen, the act of attainder was repealed, and made null as to the first dean, *s. the cardinal* and his heirs only. The Bishop died—*Quere*, Whether the Bishop his successor shall be bound by this feoffment and confirmation? And note, that no deprivation by sentence was had against the said cardinal of his deanery, but the possessions of his deanery were forfeited by the act of 26. H. 8. [c. 13.] of Treasons. *Quere inde*.

(37) Forfeited only during the natural life of the dean, which see *supra*, 108. & *infra*, 289. [3. Inst. 19.]

Davy's Case.

LIVERY ET OUSTER
LE MAINE.

[The feudal tenures and all their consequences abolished by 12. Car. 2. c. 24.]

13. E. 4. 10. b. 17. B. N. C. 113. 28. H. 6. 11. b. 1. Eliz. 168. a. Stamf. Prærog. 15. a. 13. 115. 4. Eliz. 213. a. 25. H. 6. Bro. Livery, 47. 6. R. 2. Gard. 105. Stamf. 7. 7. H. 8. Cro. 176. 5. E. 3. 5. Raft. Wards, 13. N. B. 264. a.

(38) **O**NE *Davy* held certain land in chivalry and certain land in socage of one *Fines*, as of his manor of *Broughton*, which manor *Fines* held over of the king in *capite* by knight-service; the mesne died his heir within age, the king had the wardship by office of body and manor. And afterwards the tenant *peraveil* died his heir within age, and before any office thereof found the heir of the mesne had sued out his livery; and then an office was found; and now the tenant is of full age. *Quere*, Whether he must sue livery or *ouster le maine*? and, Whether he shall sue as well for the socage as for the chivalry land? But it seems the socage land shall not be in ward by the prerogative in this case, because

cause the tenant who died seised did not hold immediately of the king, as the statute [17. E. 2.] requires. Therefore *quere* well. And see in *F. N. B. fol. 264.* that the wife of the tenant *peravail* shall not be sworn to continue a widow to the king in chancery, when her dower is assigned to her.

Stamf. Prærog. 7. 15. 18. If the heir of the tenant be of the age of fourteen years, he may seize for a relief, otherwise not. Stamf. 12. Infl. 77. F. N. B. 259. B.

* [124. a.]

*(38) **D**EBT against the heir: he pleaded *riens per descent*, except the third part of twenty-six acres of land holden by knight-service: the plaintiff replied, that he had more by descent, s. the other two parts, &c. and issue thereupon. And in evidence to the jury it appeared, that the ancestor devised by his last will the whole land to his wife till the heir should be of the age of twenty-four years, and that at that age the heir should have the whole to himself and his heirs for ever; and that when he should come to the age of twenty-four years, the wife should have the third part during her life; and if the heir died before the age of twenty-four years, that then the land should remain to the wife during her life, and after her death (if the heir had no issue) remainder to A. the daughter of the deviser, in tail, remainder to the right heirs of the deviser. The wife died after the heir came to the age of twenty-four years, and he is still living. And the jury found this matter accordingly; and upon this special verdict the plaintiff recovered by judgment, for no entail is now made by this will, but the fee-simple is descended to the son; wherefore, &c.

Land devised by A. to his wife till his son should be of age, then to him in fee reserving a third to the wife for life, and if the son should die within age, to the wife for life, remainder over if the son life no issue, is ass'ts in the hands of the h.e.r, the wife dying after he came of age.

Dier. 111. 122. Hob. 30. Vaughan's Rep. 259. 273. 2. Rol. R.p. 217. 19. El. 354. a. 1. Rol. Abr. 436. 626. 839. Plow. 145. 1. Rol. Rep. 436. [1. Black. Rep. 22. 2. Str. 1270. Co. Lit. 12. b. Mr. Hargrave's note (2) there. 1. Com. Dig. 398. And see the cases in the 8vo Cro. Jac. 591. & 2. Black. Rep. 1230.]

Sir Peter Carewe's Case.

(39) **A** QUESTION was put by CORDELL, *Solicitor General*, by command of the queen: s. *Sir Peter Carewe*, knight, who was attainted by outlawry and parliament of treason for conspiracy with *Wyat* and others, owed to the queen before his attainder two hundred marks by recognizance; and now the queen, at the special instance and request of the king, now at *Bruxelles* in *Flanders*, to whom *Sir Peter* surrendered, has pardoned him all treasons, &c.

A pardon of treason, with restitution of chattels, does not release a prior recognizance to the king.

Dyer, 245. b.

[2. Hawk. 543. & 546. in margine.]

and

[2. Rol. Ab. 179. l. 17.
Com. Dig. Pardon, F.
2. Hawk. P.C. 553-559.
2. Term Rep. 569.]

[Cro. Eliz. 516. 1. Wilk.
517. Foster, 61, 62.]

Dy. 140. 6. H. 4. 8. a.
11. El. 283. b. 182. 16.
E. 4, 5. 7. Co. 39. a.

and has also granted, given, and restored to him *all goods, chattels, lands, and tenements*, which he has forfeited or may forfeit by reason of that attainder, &c. Whether the debt be released and pardoned or gone by reason of the suspension of the execution thereof, or not? And HARE, *Master of the Rolls*, CORDEL, JAMES DYER, and ANTHONY BROWN, *Queen's Serjeants*, thought that it was not gone or pardoned; but PORTMAN, *Chief Justice*, doubted, and STAMFORD, *Justice*, said nothing. See 6. E. 4. [4. a. pl. 11.] in *Redisseisin*. But afterwards the said Justices agreed that the debt is not released or gone. See the fine levied by the conunor to the conusee and others to the use of a stranger after the statute of 27. H. 8. [c. 10.] *Hil. 18. Eliz. fol. 349. 2. pl. 15. post.*

* [124. b.]

Throgmorton against Tracey.

An abbot leases land for life, and afterwards leases the reversion thereof, *habendum* the land from Michaelmas next after the first lease ended, for twenty-one years; this is a good lease of the land for so long, and the *habendum* and the premises stand well together; and therefore, tho' the tenant for life die before attainment, yet the grant is good, the *habendum* shewing that it was intended as a lease of the land, and not as a grant of the reversion.

[See Plowd. Com. 147.
S. C. Raft. Ent. 572. a.
S. C. and the cases and books cited in the margin of Plow. qua. supra.]

(40) A WRIT of second deliverance was sued out by John Throgmorton against Richard Tracey of a taking of cattle at *Beckford* in a certain place called *Didcote*. The * defendant said, that the place where, &c. contained one hundred acres of land with the appurtenances in *Beckford* aforesaid, whereof he was seised in his demesne as of fee, and avowed for *damage feasant*. And the plaintiff said, that long before the defendant had any thing, one H. late abbot of *Tewkesbury*, was seised in fee, and demise it with the assent of his convent under their common seal, bearing such date (without shewing it), to one J. Gorge, for term of life; and afterwards, by his indenture, with the assent of his convent under their common seal, which he shewed to the Court, gave, granted, and to farm ~~to~~ *to* one J. S. and M. his wife the said tenements with the appurtenances amongst other things, *per nomen* of the reversion of all and singular the messuages, lands, tenements, meadows, and pastures of the said abbot and convent in *Didcote* in the county of *Gloucester*, &c. all and singular of which J. Gorge then held for the term of his life, *habendum et tenendum* the said messuage, lands, tenements, meadows, fields, and pastures, &c. to the said J. S. and M. and their assigns, from the Feast of *Saint Michael the Archangel* next following after the death, surrender, or forfeiture of the said J. Gorge, or when by any other means whatsoever

whatsoever the said reversion should fall in, until the end and term of twenty-one years then next following, &c. without alleging any attornment; and then conveyed the estate of *J. S.* to the plaintiff without shewing the deed of grant, and afterwards conveyed the fee-simple to king *H. 8.* by deed enrolled and surrender of the monastery, and from him to the defendant; and further averred the death of *George*, and that he entered on the morrow of the Feast of *Saint Michael*, and shewed the year in certain, and further as in the declaration. (41) And the defendant demanded oyer of the deed of grant of the reversion, which was entered *in hæc verba*. And the words were as above, *s. granted, &c. the reversion, habendum* the lands, &c. as above. And, Whether this was a good lease, or not? was demurred in law, and well debated. And three exceptions were taken to the plea in bar to the avowry: the first, because the deed of lease for life made to *George* was not shewn: the second, because the grant of the estate of the termor is pleaded before the term began, and took effect without deed: and the third, because he said, *granted, gave, &c.* the land aforesaid by the name of a *reversion, &c.* And it was holden by the Court that the plea was good enough notwithstanding these exceptions, for the matter in law depends wholly upon the deed (and the words thereof are, "*gave, granted, and to farm let, the reversion of all and singular,*" as above in the *per nomen* and the *habendum, &c.*) *s.* Whether this should be a good lease to take effect as above? or, Whether it is void because the premises of the deed speak only of a *reversion*, and the *habendum* of land as above, when there is no reversion, and no attornment made by the lessee for life.

Bro. Attornment, 41. 43.
45. 61. Dier, 26. a. 40.
58. b. 178. a. 377. a.

Vide H. 19. Eliz. fol.
accord' à cest cas. Mon-
strance de Faits, 20. 66.
177. Plow. 148, 149, 150.
4 H. 6. 1. a. Rol. Ab.
63.

Plow. 145.

And * I thought the words above would make a good lease in law for years of the land to begin as is above limited. (42) And first we should search and consider the nature and quality of a *reversion*, upon which word the whole argument of this case depends. REVERSION has a double meaning and acceptation in our law: the one is the right of reverting when the estate of possession shall have ceased; and this is no other than only an interest and expectancy to the land when the occupation and possession thereof shall escheat, and is the most common understanding of it in law: the other is, when the possession and estate which was gone for a time ceases, and where it is determined in the persons of the alienees, as-

* [125. a.]

Moor, 223.

Simile H. 2. Eliz. fol.
Plow. 150.

signees, lessees, grantees, or their heirs, as the case is, and reverts absolutely to the donor from whom it was derived, his heirs, or assigns; and this is the most apt and proper signification of this word *reversion*, which is a verbal noun, and derived from the verb *revertor reverteris*, and cannot properly be called a *reversion* until it reverts in fact: and to apply the term of reversion to land, which has no power or ability to move and return of itself or by any other power, is improper and an abuse of words; yet because it is incorporated with the land by the law and common parlance of the land, I will not oppose it. (43) And to prove that it is more properly called a *reversion* after the death of the particular tenant, the penning of the statute of *West. 2. c. 3. & 5.* which speak of reversions, declare what they are, *that they to whom the reversion belongs after the death of such, &c.* And also the form of the entries of a tenant by receipt upon the default of the particular tenant is this, *s. that A. B. holds for the term of his life, the reversion thereof after the death of the said A. B. belonging to him:* and the writs of escheat, *formedon in the reverter, cessavit, contra formam collationis*, writs of entry *in casu proviso, ad terminum qui præterit*, intrusion, and *consimili casu* are, “*and that the lands ought to revert to the said plaintiff, &c.*” And it may as well be called a remainder as a reversion when a particular estate in reversion is granted with the attornment of the tenant: as if a reversion be granted in tail, he shall have formedon in the remainder, and not in the reverter, except he have the entire fee-simple, by the *Register* [243. b.] & *F. N. B. title Formedon in Remainder* [fol 500. (D)] and by *T. 6. E. 3. 5.* [23. pl. 53.] ruled. And so the common course of levying fines of reversions is, “*bath acknowledged and granted that the land which A. B. holds for his life, and which after the death of the said A. B. ought to revert to him and his heirs, after the death of the said A. B. shall remain to the conusee, &c.*” And so here is no word of reversion, &c. and yet it shall pass to the conusee immediately. And in this last signification the term “*reversion*” shall be taken in the principal case here; and it is as much as to say “*demised the reversion of the land, &c.* and *demised the land when it shall revert*,” is all one. (44) And therefore if a man would grant me by deed, or parol, that after the death of *A. B.* his tenant for life, the land should remain to me for twenty years, that is

6. E. 3. 179. 10. E. 3.
55. 2. Plow. 157. 159. 2.

• [125. b.]

Dy. 246. 307. b. 46. b.

36. H. 8. 58. b.

[2. Term Rep. 743]

is a good lease and without attornment, because it is a contract and a chattel; but if it were of a freehold or estate of inheritance, it would not be good without livery or attornment of the tenant. And in common parlance a man is said to have a reversion in land when he expects to have the possession thereof after a prior interest and estate is finished. And in the exposition of the statute of General Surveyors, 7. & 14. H. 8. [33. H. 8. c. 39.] which gives them authority to make leases of the lands of the king for twenty-one years, provided that they do not make any grant of reversions, it was allowed before now by all the Judges, that they could not make leases of land out upon lease to commence after the former lease expires, for this is in effect a grant of the reversion; and although the word reversion be not sufficient to commence a lease of land, &c. yet because this is only a contract or agreement to pass a chattel, it shall be favourably construed for the grantee; because, by BRACTON, deeds are to be favourably construed, *ut res magis valeat quam pereat*. And in our law one word shall often be construed in the sense of another, as *shall revert* shall be taken for *shall remain*, and *à contra*; also *shall descend* shall be taken for *shall revert* by 6. E. 2. [*Fitz. Entré Congeable*, pl. 55.] in case of a receipt. (45) And this word *recipere terram* shall be taken for *re-enter* in the same Book; and in 8. Lib. Ass. [19. pl. 34.] *return* shall be taken for *re-enter* or *have the land* by breach of the condition; and one of these cases is still stronger, because it is for the advantage of the lessor or grantor, &c. And in 14. E. 2. a reversion of land for life was granted to another if he should outlive the first lessee, and the tenant attorned, this was a grant, &c. And in 15. E. 2. land was given to John J. for the term of his life, and after his death to J. D. and his heirs, without any word of remainder or reversion, and yet adjudged a good remainder. Also for the same reason that the reversion of a messuage or mill passes by grant of a messuage or mill without attornment, &c. as was ruled in the time of Ed. 1. [*Fitz. Grant*, 86.] and yet he had not the thing in possession to grant: for the same reason possession shall pass by the grantee of the reversion. (46) And in 10. Ed. 2. there was tenant in dower of a third part of a messuage, and the heir granted "the two parts, together with the third part which A. holds in dower when it shall fall," and she attorned, this was a

2. Mar. 118. a. 2. Co. 55. 2.

[4. Ann. c. 16, § 9. Dougl. 282.]

Dy. 46 b. 27. H. 8. 15. 21. H. 7. 37. 10. E. 3. 1. Feoffments, 76. Plow. 157. 2. H. 6. 4. b. 21. E. 4. 39. b. 9. E. 3. 334

[12. E. 2. 375. Cowp. 332. 3. Term Rep. 470. Shep. Touch. 84. 248.]

28. H. 8. 22. b. 9. E. 3. 7. b. 20. H. 7. 11.

[8. E. 2. 251.]

8. E. 2. Feoffments & Fairs, 107.

Plow. 155. 35. H. 6. 276. Bro. contr. 10. Co. 107. a.

Plow. 159. a. Dyer, 233. a.

good grant of the reversion without the word *reversion*; but only "*the third part when it shall fall, &c.*" and such words, "*when the reversion shall fall,*" are in the principal case here, as appears above. And as to what is said of the *habendum* being contrary to the premises, and of another thing, &c.

* [126. a.] * this is not so; for here the *habendum* does its office well, s. in the declaration and limitation of the estate, and when it shall commence and take effect; and by this it is plainly proved here, that the intention of all the parties was, that the lessee should not have any thing in the reversion immediately, for

B. N. C. 467.

then he should have the rent and fealty, and in that case there would be need of the attornment of the tenant to do the services; but here it appears the contrary, and that he shall wait till the former estate fail to have any benefit of this grant; wherefore, &c. (47) And that which is comprized under the *habendum* is not of a new thing, but of the same thing of which the premises speak, for the land and thing granted is put in the genitive case in the premises, and in

37. H. 6. 5. Grants, 13.
Plow. 14. 11. H. 4.
38. Monfrans de Faits,
226.

the *habendum* in the accusative case, and so one; for the reversion of the land includes the land itself which reverts; and therefore when a reversion is granted in tail or for life, and executed, the *formadon in the descender* supposes an immediate gift of the land, &c. Also a man may grant a rent-

5. H. 5. 8. Plow. 157.
30. E. 4. 4. 2. H. 4.
14. 44. E. 3. 45. 26.
44. Aff. 38. 22.

charge out of his reversion in *D.* and this will charge the land and not the reversion. And so it is if a man grant a reversion in tail, reserving a rent thereout, and the tenant at-

torn, the land after it reverts shall be charged with this rent, and not the reversion: 17. E. 2. [Fitz. Ab. Executors, 112.] in a *scire facias* so ruled; for rent cannot be reserved but out of the thing that is given; wherefore, &c. (48) And in

Litt. [§ 525.] a confirmation of the estate of husband and wife for both their lives shall enure to the husband as a remainder. Also a confirmation to tenant for life, the remainder over in fee, and the lessee accepts the deed, this shall enure as a remainder and attornment. SAINT JERMYNE

Lit. 129. a. 9. E. 4. 18.
Plow. 25. b. Dr. & Stu.
94. b. Plow. 160. Co.
Lit. 524.

à contra. And a confirmation of an estate in land, *habendum* the land, made to tenant for life by him in reversion, or by one joint-tenant to his companion, shall convey the interest to the party, &c. And if a man grant the disposal of the advowson of a church, *habendum* the said advowson, and the profits of the land, *habendum* the land, or the inheritance, or all his estate, or the soil of a wood, or the said wood, is good

16. E. 3. Grants, 56:

enough,

enough, for it is comprized before. And it is not like a grant of common out of the land, *habendum* the land, or of the herbage of a park, *habendum* the park; these are not good, because it is of another thing: and in a stronger case by an implication in law the *habendum* shall be construed to benefit a stranger and one not named in the premises. (49).

As if a man give land to one by deed, *habendum* to him together with the daughter of the donor in frank-marriage, this shall enure to both, because the wife is the cause of the gift, and in case of divorce she shall have the whole land, and by intendment of the law the land and wife shall be given together to the man for the advancement of the wife: and then *a fortiori* in * this case here; for, as is said before, the reversion of the land is equivalent to the land reverting, and then the land is comprized in the premises, and then the *habendum* of land is well enough. And also sometimes the *habendum* in a deed serves for a declaration of the intention of the donor or grantor, and not for a limitation only; as if land be given to two, *habendum* one moiety to one, and the other moiety to the other, this makes them tenants in common, where by the premises they were joint tenants; and this is a case in *Littleton* [§ 298.]. (50) Also 8. E. 3. [59. b.] land was given to two, to have to one for the term of his life, remainder to the other in fee, this was good, and shall enure solely and severally to the parties accordingly. Also land is given to one and his heirs male in the premises, *habendum* to him and the heirs male of his body, this is only an estate-tail, notwithstanding the premises were a fee-simple. So here the *habendum* declares the intention of the Abbot, that this grant should not enure as a present reversion immediately, for then it ought to draw with it the rent, fealty, and services of the lessee for life; but this shall enure to take effect in future after the reversion falls and not before, for he has limited a mean space and distance between the end and determination of the first lease and the commencement of the second lease, i. from the Feast of Saint Michael next after the death, &c.

And STAMFORD, SAUNDERS, and BROWN, *Justices*, argued all to the same purpose; and BROOK, *Chief Justice*,

Plow. 160. a. 11. El. 285. b.

10 Co 50. b. 4. E. 3. 4. Brief, 703. Plow. 158. 160. Perk. 162. 19. H. 6. 17. 12. Aff. 22. 8. Co. 73. a. 4. Mar. 147. b. Cro. 104. 7. H. 4. 16. 12. 19. a. Aff. 22. 9. 12. E. 3. Verdict, 31. 19. E. 3. Aff. 83. 13. E. 3. Aff. 91. 8. E. 1. Aff. 415.

* [126. b.]

28. H. 8. 10. b. Lit. 298.

Plow. 160. a. 5. Mar. 160. b. 2. Co. 55. b. 14. El. 314. b. 19. El. 361. a. Perk. 36. 45. 10. E. 3. 59. 21. H. 7. 35. Aff. 14. Plow. 298. 1. 7. 8. Co. 43. 41. 154. 3. H. 7. 21. a. Plow. 298. Lit. 31. 27. H. 8. 27. 2. Rol. Ab. 68. 1. Inst. 21. a. 2. Rol. Rep. 19.

[Co. Lit. 183. b. Shep. Touch. 108, 109. 1. Wood, 173, 174.]

[2. Black. Com. 298. Shep. Touch. 98. and note (4) there.]

Dy. 178. a.

38. E. 3. 36. a. Br. Grants, 30. 150.

(49) E. & T. 1. Job. Rot. 19. Accord' in the case of *Amice*, who was the wife of *Richard*, *Cowat*, divorced for affinity, against *Rich.* the son of *William de Sudbury*.

Note, That if the divorce be at the suit of the husband, she shall have the whole. 28. H. 8. [13. a. pl. 42.] Perk. pl. 238. & Dyer, 76. accord. 4. E. 6. Plow. 155.

38. E. 3. By BELKNAP, at a man grant the whole land which N. P. holds in dower, the reversion passes by such form of grant. But 35. H. 8. seems otherwise.

à contra. But afterwards in *Easter* Term the judgment was given for the plaintiff, *s.* that the lease was good; for BROOKE said, that he had prepared an argument on both sides, and if any one of his companions had been against the lease, he would have argued for it, and this for a different reason than had been yet mentioned; but he never told this reason in his life.

Hilary Term,

2. and 3. Philip and Mary.

Warren against Lee and Others, B. R.

If land be devised by A. to his wife for life, on condition that she shall educate B. their eldest son, remainder after her decease to the second son in tail;—B. when of age may enter for breach of the condition, and hold for her life.

* [127. a.]

10. Co. 11. b. 42.
Dyer, 117. b.

15. E. 4. 14. Pl. 230.
Dyer, 351.

[Swinn. Wills, 149, 150.
Shep. Touch. 401, 402.
2. Black. Rep. 1215.]

1. Rol. Abr. 412. (L)
6. 7. 14. H. 8. 7. a.
38. Aff. 3. Pl. 523.
Perk. 104.

(51) **I**N trespass for breaking a close by Jasper Warren against Lee and others, the defendants pleaded not guilty, and at *nisi prius* there was a demurrer in law upon the evidence. And the case was, That the father of the plaintiff was seised in fee of land holden in socage, and by his last will in writing gave the land in the premises thereof to his wife for the term of * her life, on condition that she should provide for the said Jasper, being the eldest son at school, and bring him up in virtue and good morals at her own expence until he should be of the full age of twenty-one years: and afterwards in the end of the will, he gave the land after the death of his wife to his second son in tail, reserving the fee-simple, and died; the wife entered and broke the condition; and the said Jasper after he came of age entered, and brought this action of trespass during the life of the wife: the question was, Whether his entry were lawful or not? (52) First, it is to be considered, Whether a condition may be knit to a devise, or not? And it seems it may, and this by the statutes of Wills, 32. [H. 8. c. 1.] and 34. and 35. H. 8. [c. 5.] which give power to the deviser to make devises at his free will and pleasure for the advancement of his wife, &c. or otherwise, &c. Also, to prove this by a case in Littleton [90. b.], that the executors of the deviser of land devisable by custom shall sell the land, they do it not, the heir enters, &c. Also such

such devises of land in use have been common. And see a condition, that the devisee shall pay rent to the wife of the devisor, and a clause of distress to the wife for the same; whether this destroys the condition, *quære bene*, *H. 18. Eliz.* *Dier. 33. a.* fol. [348. a. *post.*] Also, note for whose benefit and advantage this condition was made, and by whom it ought to be performed. Also, Whether the condition knit to the particular estate only be destroyed and made void by the limitation over in tail, the fee simple remaining in the devisor, or not? And it seems not, although the remainder had been over in fee, for there is a difference between the reservation of a rent and of a condition; for the one, *s.* the latter, may be without deed by livery accordingly, and the former not without deed indented, &c.; and although the remainder be not entailed upon the condition also, yet it takes effect upon this conditional livery: and see Perkins accordant thereto, the last chapter of his book [§. 831.], who makes no question of the condition, but whether he in remainder shall take advantage of the breach of it; and it seems not, &c. (53) See also F. N. B. in *ex gravi querelâ* [201. C.] such a devise upon condition, &c. remainder over in tail without condition, and good: and if a man make a lease for life reserving a rent and re-entry for default of payment, remainder over in tail, this remainder does not destroy the condition, because it is made all at one and the same time: but when the condition is once annexed to a particular estate, and then by another deed the reversion is granted by the maker of the condition, there the condition is gone, *causa patet*. Also, Whether the entry of the heir of the devisor for breach of the condition be lawful, or not? and what estate he shall be adjudged to have? and, Whether the remainder be thereby defeated, or not? And it seems, the entry is lawful, although no re-entry or entry are expressly reserved to him, because it is tacitly implied in law when the condition is to be performed by the devisee: * and this sort of condition carries with it a penalty, *s.* the defeazance of the estate to which the condition is annexed. And in common reason he who was prejudiced by the devise, *s.* the heir who was disinherited by it, shall take advantage of the breach of the condition. (54) For by GLAN-

Dy. 128. a. 1. Rob. Abr. 472. 3. Cro. 359.

10. Co. 40, 41. b.

Lit. 365. Co. Lit. 222. Lit. §. 215. 2. Rol. Rep. 216. Perk. 164. 464. 563. 20. Aff. 17. 34. E. 3. Formedon, 68.

1. Rol. Ab. 407. (B.) 1. 414. Plow. 413.

10. Co. 41. The Sergeant's case in C. B. 21. Jac. Fit. 347. 5. H. 7. 19. 27. H. 8. 28. R. 694.

29. Aff. 17.

Dier. 33. a. 138. b. 1. Rol. Abr. 407.

* [127. b.]

(53) *A.* devises lands to his mother for life, and after her death to *B.* his brother in fee, provided if his wife being enceint should be delivered of a son, that then the lands should remain to him in fee, and dies; the son is born, and it was holden that this proviso does not destroy the mother's estate, but only *B.'s.* *23. Eliz. C. B.* [Fearne Cont. Rem. 195.]

1. 6. 10. Co. 85. b. 17.
a. 45. b. Plow. 414. b.

[Ferne, Cont. Rem.
192, 193.]

Dier, 117. b. 122. a.
9. H. 6. 24. b. 37. H. 6.
36. a. 1. Co. 101. 1.
Rol. Ab. 474.
Vide Perk. fol. 118. in
Devises, 5. 66.

30. E. 3. 7. Det. 10.
Plow. 524. 1. Rol. Ab.
407. (A.) 1. 421. (N.) 1.
3. Co. 22. b.

Plow. 133. a. Co. 16.
15. a. 13. H. 7. 24.
Co. Litt. 202. a. 224. a.
1. Co. 76. a. 10. 14. H.
7. 11. 24.

Aff. 218. Br. Conditions,
111. Plo 4. 2. b. Perk.
563. 108. 10. Co. 40.

11. H. 7. 17. a. 21. H.
7. 12. a. 3. Co. 65. a.
contra. 33. H. 8. 51. b.
Plow. 135. b. 413. a.
26. H. 6. Entry con-
geable, 49. J. Inf.
214. b. contr. Dy. 222.
a. contr.

6. 12. H. 7. 8. 22. Lit.
365. Dr. and Stu. 17.
B. N. C. 465. Inf. 216.

[1. Eq. Ab. 105. note (a).
Ferne, Cont. Rem. 193,
194, 195. 2. Salk. 570.]

VIL, [lib. 7. c. 1. fol. 44.] the father cannot make a devise of land without the assent of the heir, but with his assent he may. And it seems, that the remainder is not destroyed by the entry, but the heir shall have only an estate for the life of the wife; for there is a difference between this remainder made by will, and a remainder created by deed and livery; for in the last case the entry defeats the livery; but it is not so in a will, for a remainder by will is good, although the particular estate were never good; as if to a monk, &c. And the law in this case shall be taken in the same manner as if the deviser had expressly reserved an entry and retainer during the life of the wife; and such tempering and qualifying of the penalty shall not altogether defeat the estate, &c. as Litt. [§. 327.] says of re-entry and retainer until, &c. which is only in lieu of distress or pledge, &c. (55) Also a feoffment of two acres upon condition, and that for the condition broken he may re-enter into one only, that is good; and if tenant for life and he in remainder join in a feoffment upon condition, and that one, s. the tenant for life, may re-enter, this is good, without defeating the whole estate: also the case of 11. H. 7. 6. of land given in tail, remainder to the right heirs of the donee, upon condition that if the donee or his heirs aliene in fee, it should be lawful for the donor to re-enter; this is a good condition, and shall defeat the alienation for the tail only, and not the fee. *Quere hoc.* (56) Also the case in 29. Aff. [159. pl. 17.] of a devise to Clerk to be priest, remainder to a commonalty in fee, &c. and he in remainder shall not take advantage of the breach, because no words of the will give it him, and also he is a stranger to it; but if the words had been, "*provided that if the condition be broken, his estate shall cease, and he in remainder may immediately enter,*" there he should take advantage, although he be a stranger, because the estate determines there without re-entry: and therefore if I make such a conditional lease for life, with condition, s. *that the estate shall cease,* and then aliene the reversion, the alienee shall take advantage of this condition, because the estate determines without entry, &c. Also there is a difference between the pleading of a condition comprized in a will, and in an estate or grant made by a man by livery, or estate executed in his life-time; for in the first case, no deed is necessary to plead the condition to defeat the estate; but in the other, it is.

* (57) **A** MAID-SERVANT and a stranger conspired to rob her mistress, and at a time appointed in the night she let him in at the door, and led him by a candle to the bed of her mistress, where she lay asleep, and the stranger killed the mistress in her bed, the servant neither saying or doing any thing except holding the candle: Whether she be principal in this death as well as the murderer? and also, Whether this be petit treason in the servant, as the principal actor is only a murderer? And PORTMAN, *Chief Justice*, held her a principal and traitress, BROOK, *Chief Justice of C. B.* and HARE, *Master of the Rolls*, agreeing: but BROOK, *Chief Baron*, DALYSON and STAMFORD, *Justices*, *à contra*. *Simile*, East. 16. *Eliz.* fol. 332. a. *post*.

Whether a servant letting in a felon by night, leading him to her mistress' bed, and holding the candle while he murders her, but not saying or doing any thing, be a principal? and, Whether it be petit treason in her?

[Dal. 16. S. C.]

Hal. Pl. Cr. 24. 50. 3. Inst. 20. Stamf. 16 b. 10. b. 40. 21. E. 4. 171. Pla. 98. 100. Co. Pl. Coron. 20. 8. El. 254. a. 40. Aff. 25. Crompt. 15. 40. E. 3. 42. 12. Aff. 30. 22. Aff. 55. Dal. Rep. 41. 27. Aff. 4. 1. 9. H. 6. 47. b. 4. Denl. 20. [1. Hawk.

13. H. 7. 18. 10. 22. Aff. 42. F. Corone, 309. 314. 350. 395. Mo. 91. P. C. 132. a. Hawk. P. C. 445.]

(57) By the letter of the law she shall be principal, because present at the act, and conspiring with the murderer from the beginning to the end; but by the intention of the law she appears only accessory, for the opening of the door and holding the candle were no part of the consummation, and so the law was holden 3. *Eliz.* *post*. 183. b.

Ballard against Ballard.

(58) **T**HREE co-parceners of land in gavelkind in reversion, dependant upon an estate for life. The youngest alienes his part by fine in fee, and the tenant for life dies, the eldest son enters into the whole. And the middle brother and the alienee bring a joint writ *de partitione faciendâ* upon the statute 31. *H.* 8. c. 1. against the elder brother, who pleads the general issue, *s.* that they do not hold together, and by undivided, &c. And upon the evidence the case appeared as above. And thereupon the defendant demurred in law, and the jury were discharged. And by the opinion of PORTMAN, BROOK, STAMFORD, BROWN, HARE, and BAKER, the action is not maintainable as above, for they are entitled to several writs of partition, *s.* the one to the writ of co-parcenary at common law, the other by the

A purchaser of the share of one parcener cannot join in a writ of partition with another of the parceners.

1. Ander. 30. S. C. O. Bend. 20. } S. C. N. Beal. 42. }

[Robins. Gavell. 109. 123.]

Co. Lit. 175. 157. b. Jenk. cent. 4. c. 96. 8. El. 243. a. 26. 27. 29. 31. 36. Aff. 39. 68. 22. 33. 1. 21. 24. 40. 43. E. 3. 27. 42. 8. 16. & 19. & 27. 1. 14. H. 6. 5. 25. 16. H. 7. 4.

(58) 12. *Eliz.* *Mullineux's Case*. [Palm. 136.] Sir Edward Mullineux devised by his will to his younger son twenty nobles per ann. and to the others several sums annually to be paid, and devised his land to his eldest son, upon condition that he should pay such a sum, and upon default of the heir, that the executors should have it, and pay the same; if they failed, that the said devisees should retain; the heir and the executors did not perform the condition, the younger son entered, and adjudged that his entry was the entry of the others, by NOV, *Attorney General*, Lent Readings 1632.

statute,

statute, but they cannot join. And also *quære*, Whether the entry of the eldest give seisin to the others, or not? which is difficult to the stranger, as I believe (a).

(a) By the alienation of one co-parcener, the other and the alienee become tenants in common, Lit. sect. 309. and Co. Lit. 167. b. and note (2) there. And the entry of one tenant in common serves for all. See Hob. 120. and the books cited there, and Cowp. 219. 5. Burr. 2607. 1. Black. Rep. 675.

Wilford and Wilford, Executors of their Father,
against Wilford their Uncle.

Devise of lands to *A.* in fee, conditioned to pay five hundred pounds; if he fail payment, to *B.* and his heirs with the like condition. The deviser dies, *A.* does not pay the debt. *B.* dies; the money is demanded of the executors, who refuse. Whether *B.*'s heir may enter to perform the condition? *quære*.

Dier, 33. 6. Co. 30.
Lit. 383. 26. 38. Aff.
39. 3. 38. E. 3. 11. &
12. Litt. §. 337. Flo.
345. Dyer, 127. B.
N. C. 125.

[10. Mod. 419. Shep.
Touch. 401. Fearnie,
Cont. Rem. 303. 2.
Wilf. 29. 1. Br. Ch.
Cas. 147. 3. Term Rep.
143. 4. Term Rep. 441.]

* [128 b.]

(59) *WILFORD* the father and testator was bound in an obligation of five hundred pounds to the corporation of Merchant Taylors in *London*, no day of payment being expressed, or any condition in the obligation: afterwards he made his will in writing of lands in fee simple in *London*, and gave and devised them in fee simple to his two sons and executors, *upon condition, that if they did not pay the said five hundred pounds to the said corporation according to the tenor of the said obligation, then he willed that the said gift will and bequest should be void and of no effect, and that then by these words, s. "that then as now, and now as then, I will "give and bequeath the premises to the said Wilford the uncle, "to have and to hold the same to him, and to his heirs for ever, "upon condition that he shall pay the said sum of five hundred "pounds to the said corporation,"* as he had willed his said executors to do. The father died; the five hundred pounds are not paid by the* executors; the uncle died not having paid them; and now a demand of the money is made upon the executors. Whether the heir of *Wilford* the uncle may enter, and be in a situation to perform the condition, or not? *quære*.

(a) Mansell and Herbert's Cafe.

(60) A MAN seized certain goods belonging to Frenchmen in time of war upon the sea, and carried them to his house. A stranger pretending to be vice-admiral with a great number of persons came to the house where the goods were, with force, and made an assault upon them that were in the house at the gate of it, when a gentlewoman came out of the house unarmed, and was killed by one of the servants who came to take the goods, by the throwing of a stone at another in the gate. And the party who came to take the goods proclaimed, and said, (before his coming) "*that he would make him a Cokes who kept the goods;*" and said also, "*that he would make him to know the basest in his house.*" *Quære*, Whether this be murder by the death of the woman?

And the case was moved among all the Judges, and divers, *SAUNDERS, HIGHMAN, Chief Baron, WHYDDON, BROWN, and DALYSON, Justices, and BROWN and CATLINE, Sergeants*, and the Attorney and Solicitor General held, that if it appeared the woman came in defence on the part of *Mansell*, then this was murder in *Herbert* and all his companions; but *BROOK, STAMFORD, MORGAN, DYER, and PRIDEAUX* to the contrary, for no malice was intended against the woman, and murder cannot be extended beyond what was intended, &c. And the first held, that if two fight by appointment beforehand so to do, and an indifferent stranger come to part them, and be killed by one of them, it is murder in him who killed; and some said in both, but the others would not agree to this.

Where persons assembled with force to seize goods under pretence of lawful authority, and a woman unarmed coming out of the house was killed by a stone thrown by one of the assailants at another person in the gateway, this is murder in them all.

2. R. 3. 2. 7. E. 4. 14.
a B. N. C. 294. 4.
Co. 40. b. 7. Co. 10.

Dr. and Stud. 134. b.

Lambert, J. P. 244.
Plow. 97. 314. F. Co.
rone, 262. 314. Crompton, 18. B. N. C. 237.
Stamford, 16. Dal.
Rep. 40. Poulton, 120. b.
Flo. 101. 174. 22. A.B.
71. Stamford, 16.
Crompton, 20.

[1. H. H. P. C. 441. 1.
Hawk. P. C. 127, 128.
Foster C. L. 351. 356.
See Dougl. 207. Cowp.
830. Cald. 218. 244.]

(a) In the *Abridgement*, Lond. 1609. this case is entirely omitted, though it is in all the editions of Dyer's Reports, and instead of it, the *Abridgement* has the following note in French:

"*I. Constable pointed to one, and said to his friends, 'Behold King Edward, he hath sent to the queen to give up to him the kingdom, and she hath answered him, that he gain it by the sword, and yet she knows that he hath right thereto.'*" It is not a direct affirmation that another than the queen hath right to the crown within 1. Mar. by the greater opinion. Yet he had judgment and execution as a traitor. *Quære*, if he be not within the declaration of 25. E. 3."

This is not in the old edition of 1592, nor in any other that I know of, nor in the MS. of inedited cases in the *Inner Temple* library. Yet LORD COKE, 7. Rep. 10. b. cites it thus: "In 2. & 3. P. b. and Mar. Dyer 128. One Constable dispersed divers bills in the streets in the night in which it was written, that K. E. 6. was alive, and in France, &c. and in Coleman-street in London, he pointed to a young man and said that he was King Edward the sixth. And this being spoken *de inviduo* (and accompanied with other circumstances) was resolved to be high treason; for the which Constable was attainted and executed."

If a subject refuse to return into the kingdom upon the king's mandate, his lands and goods shall be seized for the king's use.

Dier, 375. 163. b.

2. El. 177. a. N. B. 85.
Dier, 151. b. 7. Co. 20.

[1. Hawk. P. C. 91.
11. St. Tr. 60, 61. 1.
Black. Com. 166. 4.
122. 4. Bac. Ab. 170,
171.]

(61) **A**LSO it was moved, that if the queen send a special mandate under the privy or great seal to any of those who are now in parts beyond sea, and who departed out of the kingdom without license, s. that they shall return into the kingdom at a certain day upon pain, &c. and they refuse to come, their lands and chattels shall be seized to the use of the queen for the contempt. And a notable precedent was shewn of such a matter in 19. E. 2. in the exchequer against the earl of *Richmond* called *William of Brit-tany*, who was sent for into *Gascony* by the king, and refused to return into the kingdom at the king's command, where-upon his goods and chattels, lands and tenements were com-manded to be seized into the hands of the king, &c.

* [129. a.]

* *Marrow against Drew* in Error.

If a writ of entry be made returnable on a day before the *teste* by mistake of the attorney, it is error.

Dyer, 168. a. Noy, 57.
1. Rol. Ab. 200. 1.
Cro. 38. B. N. C. 461.
5. Co. 45. 8. H. 6. c.
12.

[Barnes, 17. Cowp. 425.
2. Black. Rep. 836.
Doug. 135. 1. Hen. Bl.
291. 541. 3. Term
Rep. 657. 1. Com. Dig.
316.]

(62) **A**WRIT of error was brought by *Marrow* against *Drew* upon a judgment by verdict in a writ of entry in the *quibus*, and the error was assigned in the original writ, which writ was returnable, and returned on the Morrow of the Purification in 7. Ed. 6. and the *teste* was the 13th day of *February* in the same year, which is out of Term, and after the day of the return; and this was the negligence of the attorney, for the writ was first made returnable in fifteen days of *Easter*: and for expedition he caused it to be erased, and the Morrow of the Purification inserted; and forgot to amend the *teste*, s. to make it the 13th of *January*, &c. therefore *quere*, Whether this should be amended?—And at length the judgment was reversed.

Bonville against Payne.

G. tenant in tail before 27. H. 8. makes a gift in tail to A. remainder to his own right heirs;

(63) **G**RANDFATHER, father, and son: grandfather tenant in tail before the statute 27. H. 8. [c. 10.] made a discontinuance in fee to the use of himself for life,

(63) Tenant in tail makes a feoffment and dies, and a gift in tail is made by the discontinuance, remainder to the issue in the first tail in fee: the second tenant in tail dies without issue, his wife privily enfeint with a son; the issue of the first tail enters, and then the other issue is born, and enters upon him, and he brings assize, and not maintainable, Plowd. Que. 81.

and

and after his death to the use of a stranger in tail, and for default of such issue to his own right heirs, and then died. And afterwards the father died before the statute; and after the statute the stranger died seised of the estate tail executed by the statute, without issue, his wife being privily enceint: wherefore the son, as right heir to the grandfather, entered, and afterwards the issue *in ventre sa mere* is born: Whether he can re-enter upon the son? or, Whether the son is remitted, or not? And *quære* whether he be remitted; because by the statute he is the first person in whom any remainder in possession vests, and this is of a fee simple, of which estate necessarily by the statute he must be deemed in; wherefore, &c.

the donee enter, and dies, leaving his wife enceint; *G.'s* son enters after the statute: Whether he shall be remitted? or may *A.'s* issue when born enter upon him? *qu.*

Dy. 23. b. 51. 191. 104. 106. 111. E. 4. 1. 9. 9. H. 6. 24. a. 34. H. 8. 54. b. N. B. 39. M. 21. E. 3. a. 34. H. 8. Br. Remitter, 49. B. N. C. 251. 1. & 2. M. Benl. 195. contr. 1. Inf. 348. b.

[Hob. 254. 3. P. Wma. 461. Plow. 111. Com. Dig. Remitter, (C. 6.)]

The Bishop of Carlisle *against* Smith.

(64) A WRIT of waste was brought by *Robert* bishop of *Carlisle* against one *Smith*, for waste in *Carlisle-place* in *Lambeth Marsh*, and the writ was to the disinheriting of the said bishop: and he counted, that he was seised in fee of the place in right of his church, and of his bishoprick aforesaid, and made the lease to the defendant; and upon *nul waste* said pleaded, it was found for the plaintiff, and alleged in arrest of judgment, that the writ should be to the disinherison of the church, according to the *Register* in waste by a prebendary, which is to the disinheritation of the prebend. And it was alleged that the printed *Register* in the last writ of waste but one, [fol. 76. a.] is to the disinheritation of the said bishop of the blessed *Mary* of *Lincoln*. And two manuscript *Registers* are to &c. of the church, &c.

Whether waste by a bishop shall be laid to the disinherison of the church or of the bishop? *qu.*

10. H. 7. 5. b. 42. E. 3. 21. b. 7. 9. H. 6. 18. 25. N. B. 57. a. 39. E. 3. 15. b. 2. H. 4. 2. b.

[Regist. Brev. 73. b. a. Rol. Ab. 83a. Co. Lit. 341. a.]

* Easter Term, 2: and 3. Philip and Mary.

Heydon and Igrave.

Attaint upon 23. H. 8. c. 3. shall not abate upon the death of the original defendant.

The statute 34. & 35. H. 8. c. 21. must be specially pleaded.

If not allowed to be given in evidence on the first trial, it shall not be heard on the attaint.

Co. Lit. 394. 125. b. Hob. 227. 28. E. 3. 90. a. 6. Co. 33. & 34. 15. 3. Leon. 162.

3. 4. Co. 10. 35. Dy. 27. Rol. Contin. 360.

Hob. 227. Ante, 53. b. 1. Rol. Ab. 285.

[Bul. Ni. Pr. 222. Gilb. Evidence, 42.]

4. El. 212. a. 7. E. 4. 39. b. 34. H. 8. 53. b. Post. 331. 22.

[Bull. Ni. Pr. 222, 223. 3. Black. Com. 404.]

(65) **I**N the attaint between *Heydon* and *Igrave* in *B. R.* *Igrave* died pending the writ, and yet because of the stat. 23. H. 8. [c. 3. §. 5.] upon which this attaint was brought, the writ stood and was not abated. And the false oath was assigned in this, that twelve jurors of the first inquest said, that forty acres of land in *Sarret* in the county aforesaid were not contained in the letters patent of king H. 8. made to one *A.* and one *B.* 4. July, 35. H. 8. And the plaintiff averred affirmatively, that they are contained in manner and form as he alleged in the affize brought by *Heydon* against *Igrave*. And the truth of the case was, that in the letters patent the vill was mistaken, and also the name of one who was late a tenant, for it was supposed by the letters patent that the land was in *Watford*, and late in the tenure of *John Whitton*, gent. and this was true; and afterwards in the tenure of *John Johnson*, but this was false, for he was excepted out of that lease by express words. And yet by statute 34. & 35. H. 8. [c. 21.] of mis-recital, non-recital, &c. it was holden by the counsel for the plaintiff that the land passed by the letters patent; but in the pleadings in affize the statute was not mentioned, but generally that H. 8. by letters patent bearing date &c. gave the said tenements in *Sarret* by the name &c. as above. And the Justices of affize would not permit the statute to be given in evidence to the jury because it was not pleaded, or embarrass them with it. And for this reason the Judges in banc would not have it recited in evidence to the grand jury, because it was not given in evidence to the first jurors: wherefore the plaintiff in attaint was afterwards nonsuited. See a patent void for mis-recital, and *à contra* in H. 3. Eliz. fol. 194. and 195. *post*.

(66) 28. Eliz. [Goldf. 23. 3. Leon. 162.] *Heydon* brought a writ of right for the same lands, supposing that he was relieved by the statute; and it was ruled *per tot. Cur.* upon evidence to the jury, that the land does not pass by the statute, because there was no certainty in the gift, for it was not in the parish of *Watford*. And afterwards 30. Eliz., upon such a writ of right brought, the case was moved again, and ruled as above.

Agard *against* the Bishop of Peterborough and
Another.

(66) *QUARE Impedit* was brought by *Agard* against the bishop of *Peterborough* and *Denton*, clerk. And the plaintiff counted that the earl of *Oxford* was seised of the advowson of *O*, in fee, as in gross, and presented the said *Denton*, who was instituted, &c. in the time of *Hen. 8.* And afterwards, i. 13th *Sept.* in the first and second years of the now queen, by his writing, shewed to the Court, that the Earl granted the first and next avoidance of the said church, when first and next it should happen to be void, to the said *Agard*; and further shewed that the church was void by reason of the said *Denton's* being inducted to the benefice of *Up-master* in the county of *Essex*, which induction was in *April*, in the first year of the present queen, which was before the grant of the advowson, and so alleged in the count; * by reason of which induction, and by virtue of the statute 21. *H. 8.* [c. 13. §. 9.] of pluralities of benefices with cure, and of the value of eight pounds by the year and more, the church was void; and averred the benefices to be above the value of eight pounds, and counted over according to the statute; and also in the conclusion of the count averred that this avoidance was the first and next after the gift and grant aforesaid, &c. And issue was joined upon the induction, and tried at *nisi prius* in *Essex* at the last assizes, for the plaintiff. And it was alleged in arrest of judgment, that the matter of the count as above will not maintain the *quare impedit* for the avoidance aforesaid. *Causa patet.*

A church being void, the present turn shall not pass under a grant of the next avoidance.

Intratur Trin. 1. and 2. Phil. and Mar. Rot. 701. Rookwood.

M. 2. and 3. Phil. and Mar. Rot. 609. accord' al Benl. c. 79. Mo. 12. } S. C. 1. And. 15. Dy. 237. 282. N. B. 34. b. a. Rol. Ab. 45.

*[3. a.]

14. H. 7. 28. b.

Jo. 138.

Dy. 282. 300. 377. b.

4. Co. 79. 2. H. 4.

17. 6. Co. 29.

[Gibb. Cod. 758. Watf.

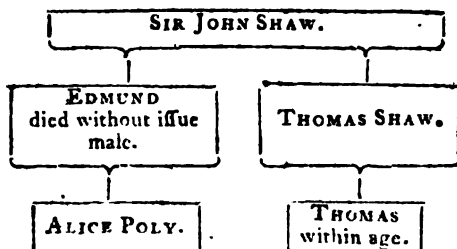
Clerg. L. 88. 3. Leon.

196. 3. Burr. 1510.

1512. 2. Wilk. 180.

196. See 2. Black.

1952.]



Tenant for life, remainder in tail, remainder in fee of land holden in chivalry of the king: he in remainder in tail dies his heir within age, the king grants over the feignory, and the tenant for life dies. *Qu.* Whether the grantee shall have the ward?

Moor. 608.

(67) THE king lord of lands holden in chivalry, *Thomas Shaw* the father being tenant in tail thereof to him and the heirs male of his body, remainder to the heirs of the body of *Sir John Shaw* then dead (whose right heir was then *Alice*), remainder over in fee simple to the right heirs of *Sir J.* which was the said *Alice*. The said *Thomas* the father, in 27. *H. 8.* after the death of the said *Sir J. S.* and *Ed. S.* covenanted to suffer a recovery to the use of one *L.* who was the wife of the said *E.* for the term of her life, and after her decease to the use of *T. S.* the father, and the heirs male of his body, and for default of such issue to the use of the heirs of the body of *Sir I. S.* then being dead, remainder over to the use of the right heirs of *Sir I. S.* and the recovery was suffered accordingly. And after the statute 27. *H. 8.* [c. 10.] the said estates were executed in possession accordingly. And then *Thomas* the father died, living the said *L.*—his said son *T.* within age. And the

2. H. 7. 15. a. 33.
H. 6. 5. Dy. 137. b.

(67) 2. Co. 94. a. Co. Litt. 78. *Robert Bingham, esquire*, seised in fee of the manor of *Bingham Melcum* in *Dorsetshire*, holden of *Sir John Horsley Milcome*, as of his manor of *Horsley's Melcum* in chivalry, in the 12th year of *Eliz.* levied a fine of it to the use of himself and *Jane* his wife, and his heirs. 20. *Eliz.* he levied another fine of the same manor of *B. M.* to the use of *Robert* his son and heir in tail, and afterwards to the use of his own right heirs. 30. *Eliz.* *Robert* the son died, having issue *Richard*. 31. *Eliz.* *Sir John Horsley* suffered a recovery of his manor of *Horsley's Melcum* to the use of himself in tail, and afterwards to *Sir Robert Horsley* in tail, and then to his right heirs, and died without issue. 36. *Eliz.* *Robert Bingham* the grandfather died. 41. *Eliz.* *Jane* died. *Richard Bingham* the heir in tail within age, with *John Strode* and *Ann* his wife, father-in-law and mother of *Richard*, entered into *Bingham Melcum*, and demised it to *William Albert* for seven years, who demised it to *George Strode, esq.* for six years and an half, and he being ejected by *Sir Robert Horsley, Richard Fale* and *Edward Gore* brought *ejectione firmæ*. 24. *E. 3. 33. b. M. 41.* and 42. *Eliz. Rot. 144.* This case being found in a special verdict, three questions were moved and urged by *Coke*, Attorney General, *ex parte Strode*, plaintiff, and by *TANFIELD* and others, *ex parte Horsley*, defendant. 1st, Whether the remainder to the right heir of *Robert Bingham* the grandfather, limited upon the fine of 20. *Eliz.* be his ancient reversion, and the *Robert* the son being tenant in tail holds of him, and his issue shall be in ward to the grandfather as at first, or not to *Sir Robert* as lord paramount? 2dly, Whether *Sir Robert*, coming to the feignory after the death of *Robert* the son, being tenant in tail, and during the life of the tenant for life, shall have the wardship of the land after the death of tenant for life, for now the issue is in by an ancestor who never died in *Sir Robert's* homage? 3dly, Whether by the saving to the lord upon the statute 32. *H. 8. c. 1.* *Sir Robert* shall have the third part of the land in ward during *Richard's* minority? *M. 41.* and 42. *Eliz. Rot. 144.* And the case on the 18th of June in *Trinity Term*, 43. *Eliz. A. D. 1601.* was adjudged in *B. R.* in all the three points for the plaintiff: to which judgment also (by the Report of *SIR JOHN POPHAM, Chief Justice*), each of the Judges at *Serjeant's Inn* in *Fleet-street*, *CLENCH* and *GAWDY* excepted, agreed. *Teste Jobanne Strode.*

king

king afterwards granted the feigniori to *Lord Rich* in fee, who is seised of the services by the hands of *L.* and afterwards *L.* died. *Quære*, Whether *Lord Rich* shall have the wardship of the body of the heir and land because the father *T.* died before the feigniori was granted?

(68) The case in *M. 24.E. 3.* [33.a.] was as follows: Lord and tenant in chivalry, the tenant made a gift by fine for life, remainder to husband and wife in special tail, remainder over in fee to the husband; and afterwards the lord granted the feigniori, and the tenant for life attorned, and afterwards the donees in remainder had issue of full age, and died during the life of the particular tenant for life; and afterwards the issue had issue within * age, and died, and then the tenant for life died, the issue of the issue being within age; the grantee of the feigniori shall have the wardship of the body and land. Ruled in ward (a).

24. E. 3. 11.
Gard. 48.
N. B. 48. b.

* [140. b.]

11. H. 7. 10. a. 40.
E. 3. 9. b. 3. Bull.
254.

(a) Wardship, with the rest of the feudal services, abolished by 12. Car. 2. c. 24.

Hill against Grange.

(69) **TRESPASS** was brought by *W. Hill* against *Grange*, for a trespass committed in a messuage and two hundred acres of land in *Dalton*; and the case was, That a man seised of a messuage and one hundred acres of land in *D.* leased it by indenture in *August* in the third year of the present reign to *John Grange* by these words, "his messuage in *D.* with all the lands to the said messuage belonging, habendum to him for the term of twenty years, rendering annually forty shillings at the Feasts of the Annunciation of the Blessed Mary and Saint Michael the Archangel," with a clause of re-entry for non-payment of the rent by ten days after any of the said Feasts; and then the lessor granted the reversion to *W. Hill* the plaintiff in fee, to whom *John Grange* the lessee attorned; and afterwards *W. Hill* demanded the rent on the 9th day of *October* in the third year aforesaid, due at *Michaelmas* in the said third year, and the lessee came an hour before sun-set, and offered the rent, and the grantee refused it, and afterwards re-entered, and the lessee ousted him, and the grantee of the reversion

The Serjeant's Case.

Land cannot strictly be appurtenant to a messuage, but such word may be construed to pass the land by the intention of the parties.

Where rent is reserved on two Feasts yearly, it shall be paid on that which comes first, tho' named last.

Demand or tender of rent on the last inomeht of the day of payment is good.

The grantee of a reversion of every common person may enter for conditions broken, by the statute 12. H. 8. c. 34. And so may the patentees of a reversion of Edw. 6. and of all other heirs of Hen. 8.

See Plowd. 167. S. C. and Raft. Ent. 657. b. Plow. 164. B. N. C. 483.

brought a writ of trespass. And for the trespass in one hundred acres of land residue the case is, That the prior of S. was seised thereof in fee in right of his monastery, and leased them by indenture under the convent seal to the said *John Grange*, in the twenty-fourth year of H. 8. to have to him for twenty years, rendering annually forty shillings at the Feasts of *Saint Michael* and the *Annunciation of the Blessed Mary*, with a clause of re-entry if the rent should be in arrear by ten days after any of the Feasts. And afterwards the prior by deed inrolled under the convent seal gave and surrendered them to the said king H. 8. in fee. And afterwards the said king died seised thereof, and the said tenements descended to king Ed. 6. And afterwards the said king Ed. 6. by his letters patent granted the reversion and rent to the said *W. Hill* the plaintiff in fee; and afterwards the plaintiff demanded the rent, and for non-payment by the space afore-said he re-entered, and *I. G.* the lessee ousted him, and he brought a writ of trespass. (70) STAMFORD, *Justice*, thought that land might be *appurtenant* to a messuage, but not *parcel* of it; but SAUNDERS, BROWN, and LORD BROOKE, *à contrà*, because they are of the same nature, but yet by the words above the land passed by the intendment of the parties, and the open cognizance of the use and occupation of the land and house together. STAMFORD and BROOKE thought the payment should be at the next Feast of *Saint Michael*, because it is *annually*, and by equal portions. But SAUNDERS *à contrà*; because his own reservation, &c. appoints by the (*videlicet*,) how, &c. See 10. E. 3. [43. b. pl. 4.] in annuity. STAMFORD and all the others, that the demand was one hour before sun-set, which is the artificial day by BRACON, and the † natural day is *twenty-four hours, s. the day and the night: and it is good enough, and the tender of the rent in the same manner on the last of the ten days, and without a double demand, s. at the Feast, &c. And notwithstanding the pleading is, for the whole day, s. from the rising to the setting of the sun, this is not necessary, unless in cases where the sum of money is very large, and requires a considerable time to pay it in, &c. STAMFORD and all the others, that every grantee of the reversion shall take advantage of the condition, by the express words or intention of the makers of the statute

27. H. 6. 2. a. 3. E. 2.
Br. 783. 3. E. 3.
Bar. 298. Plow. 170.
4. Co. 37. 31. H. 8.
160. b. 32. H. 8. 185.
Br. 4. Mar. 483. 171.
accord. Fulb. 77. 11.
E. 3. 292. 1 Inst. 217.
b. 11. E. 3. fol. 526.
B. Leases, 14. or 74.
4. Mar. Br. Leases, 65.

[* 131. a.]

[3. P. Wms. 177.
1. Saund. 287. Salk.
578.]
26. H. 6. 30. Entry
Congeable, 6. 4. Mar.
Br. Tender, 41. accord.
38. H. 8. Br. Con-
dition, 192. 6. H. 7.
3. b. Plow. 172, 173.
5. Co. 114. 1. Inst
202. a. 215. a.

[5. Com. Dig. 432. 4.
Bac. Ab. 357.]

† A day large or natural is twenty-four hours long, strict or civil is twelve hours long.

[32. H. 8. c. 34.] or by the equity of it. A statute shall be received according to that exposition which the sages nearest the time have given it, and this statute is a general remedy for a general mischief. Also all thought that the patentees of king Ed. 6. shall take advantage by express words, or by equity. And for the form of statutes penned in these words, "*our lord the king,*" see [10.] Ed. 3. [ft. 1.] c. 3. for main- Plow. 176.
prize to be found by them who have charters of pardon, &c. Plow. 164.
and 25. E. 3. [ft. 5, c. 2.] for treasons.

(71) **D**IVERS leases for terms of years were made by the late abbot and convent of *Combe*, of parcel of their demesne pastures. And king *Henry 8.* granted all the scite of the monastery and the demesnes, as well those that were in lease as those that were out of lease, to the duchess of *Richmond* for the term of her life, and then died seised of the reversion in fee, which descended to king *Edward 6.* who granted it to the late duke of *Northumberland* in fee: and the duke made a deed of feoffment of all the premises to certain persons to the use of his eldest son who was earl of *Warwick*, and *Mary* his wife, for the term of their lives, with divers remainders over, and made a letter of attorney to make livery; and the attorney did make livery in one pasture, which was in lease for years, in the name of all in the county, &c. without any attornment of the duchess, and without any agreement of the termors. *Quære*, How much shall pass? And in this case it was holden by SAUNDERS, WHYDDON, BROWN, STAMFORD, BROOKE, Chief Baron, A. BROWN, and CATLINE, that if a man make a lease to one for life, and afterwards the lessor make a deed of feoffment, with letter of attorney to enter and make livery, and it want these words, "*and all others thence to expel, &c.*" and the attorney thereupon make livery, it is not a good feoffment, because it is a disseisin of the lessee, and not a lawful act, which is intended in law in an authority to make livery: but the two Chief Justices, PORTMAN and BROOKE, and DALISON, Justice, SIR J. BAKER, DYER, and the ATTORNEY and SOLICITOR GENERAL, *à contrà*. *Ido quære*. *Vide simile*, *11. 17. Eliz. fol. 339. post.*

On a feoffment of lands, some in lease, others not, with letter of attorney to make livery, he do s it in one parcel of the leasehold in the name of all, but without the attornment, or agreement of the termors: *Qu. What passes?*

Dy. 18. b.

[4. Ann. c. 16. §. 9.]

29. H. 8. 33. a.

[Bac. Ab. Feoffment, B. 2. Com. Dig. Feoffment, B. 7.]

2. Rol. Abr. 8. 2. Co. 31.

17. El. 340. a. 363.

Co. Lit. 48. b. 90. b. Moore, 91.

Reade *against* Rochforth and Others.

Continued from page
121. a. *supra*, where
see the abstract.

Dyer, 150.

4. Co. 47, 48.

2 Inst. 384.

6. Co. 65. 41. Aff 24.

Stamf. 98. b.

[2. Hawk 288. 291.]

[2. Inst. 385.]

11 Co. 7.

[2. Hawk. 289.]

(72) **I**N appeal, *Reade against Rochforth and others*, the case was, Two principals and one accessory were arraigned at the suit of the king upon * the nonsuit of the plaintiff in appeal, and all pleaded not guilty, and several writs of *venire facias* were awarded against the three. And after the return of one of them served, one of the principals made default, and the other principal was tried and acquitted, and the accessory was also found not guilty as accessory to one of the principals who was outlawed; and the abettors were inquired of severally by the two inquests, and then the other principal who made default came in upon the exigent by the sheriff. *Quere*, Whether he shall be tried by the inquest first returned upon his plea, or whether a new *venire facias* shall issue? But by the roll, this process against the jury was discontinued, and a new *venire facias* awarded. And *quere*, Whether if he be acquitted, the said inquest shall inquire anew of the damages and abettors, for the accessory, or whether the first assessment and inquiry shall stand? (73) Also, Whether if the last principal who is to be tried be acquitted (by which trial the accessory also would be discharged), the Justices of *nisi prius* shall give judgment upon him, or the Judges in the king's bench; because the Justices of *nisi prius* did not give judgment of acquittal upon him at first, as they well might, as it seems by statute 14. H. 6. [c. 1.] And afterwards the last principal was now acquitted at the last *nisi prius*, and damages were found at ten pounds, and that the plaintiff was sufficient for them; and at the request of the accessory the jury found damages for him at two hundred and twenty pounds, and that the plaintiff was insufficient. And they found six abettors and procurers of the appeal's being prosecuted against him *ex malitiâ*; so the accessory had his damages assessed by three juries as above. *Quere* upon which of them he shall have process against the abettors? And as it seems upon the last, because before that he was not legally acquitted. (74) And afterwards *Swimborne* the accessory sued a *scire facias* against the abettors, in which writ he made no mention of the acquittal of the principals; wherefore exception was taken, &c. Also some of the defendants pleaded that they did not abet, and one justified by reason of the common voice and same;

fame; to which the plaintiff replied, that he did it of his own wrong, without any such cause; and so it was found; and also that the others abetted, &c. and damages assessed; and he had judgment (*ut audiui*).

Stamf. 121. 171.
8. E. 4. 3.
35. H. 6. 14.

Trinity Term,

2. and 3. Philip and Mary.

(75) **MEMORANDUM**, That it was moved for a doubt among the Judges and king's Serjeants, Whether, if treason be committed in *France*, or any where out of the realm, it be inquirable and triable by law at this day, by the statute of 35. H. 8. c. 2. because in the statute of 1. and 2. Ph. and M. c. 10. it is enacted, *That all trials hereafter to be had, awarded, or made for any treason, shall be had and used only according to the due order and course of the common laws of this realm, and not otherwise, &c.* And it seems that notwithstanding this, the statute 35. [H. 8. c. 2.] is in force, because no offence of treason committed out of the realm was triable here by the course of the common law, therefore this statute enlarges the power and authority of the trials of the realm in this point: but for treason committed in a foreign county, and triable in *B. R.* or in any county at the pleasure of the king, by statute 33. H. 8. c. 23. it seems otherwise; because this treason by course of law was triable in the county where the offence was committed, &c. And yet the intent of the statute 1. and 2. Ph. and M. c. 10. was to remove the two accusers and two witnesses. And for the cause above, the Judges, SIR JOHN BAKER, and HARE, *Master of the Rolls*, were assembled, and they thought as above, and by the words above, *s. according to the order and course of the common law*, it shall be intended that the trial shall be in the county where the indictment is, and also by twelve men, &c. and this was in the *Michaelmas Term* following. See *H. 12. Eliz. fol. 286. b.* where this opinion of trial in a foreign county is confirmed by the Judges of both the benches.

25. H. 8. c. 2. as to treasons committed beyond sea, is not repealed by 1. and 2. Ph. and M. c. 10. §. 7. *Contra*, of 33 H. 8. c. 23. with respect to the trial of treason in a foreign county.

Dal. Rep. 38. Dy. 298 b.

* [132. a.]

20. El. 360. b. 13. El. 2. 300. b. 11. Co. 58. 5.

Intra, 145. a. 11. Co. 63.

3. Inst. 11. 24.

[2. Hawk. 317, 318. 1. H. H. P. 374. Fost. C. L. 238.]

Stamf. 50. b. 38. H. 8. c. 2. *Rast. Trial*, 12. 14. Stamf. 89.

[2. Hawk. 363. 1. H. H. P. C. 299, 300.] B. N. C. 481.

[2. Hawk. Pl. C. 568 569.]

Grenfield against Strech and Others.

Leafe by *A.* by indenture, witneſſing that he as ſurveyor general of *E.*'s lands in *D.* demifed &c. tenements in *L.* with rent and re-entry reſerved to, and claufe of warranty from *B.* ſealed by both. Whether this be a good leafe?

After appearance and before verd. & in affize the plaint abridged. [3. Vin. 167.]

Benl. a. 3. Leon.

3. [Benl. 42.] S. C. pl. 74.]

9. Co. 76. b. Cro. 11. 6. pl. 56. Cambden Brit. 358.

9. Co. 77.

* [132. b.]

Ante, 106. b.

[Godb. 389. 3. Bac. Ab. 408, 409.]

(76) **A**SSIZE of *novel diſſeiſin* was brought by *I. Grenfield* againſt *Peter Strech*, *William Strech*, and others; and they all appeared by attorney, and pleaded no tenant of the freehold named in the writ, judgment of the writ, and if, &c. *nul tort*, &c. and the aforeſaid plaintiff *ſimiliter*. And the recognitors appeared on the firſt day of the aſſize, and then the plaint was abridged; and they found by ſpecial verdict, that *T.* late marquifs of *Dorſet*, was ſeiſed of the land put in view, and plaint, &c. in his demefne as of fee. And he being ſo ſeiſed thereof, one *Richard Phillips* and one *T. Chauntrel*, as the ſurveyors of the ſaid marquifs of his ſaid tenements at *London*, in the pariſh of *Saint Dunſtan in the Weſt*, in the ward of *Farringdon Without*, by indenture, bearing date, &c. and to the ſaid jurors in evidence ſhewn, gave and granted to the ſaid *Peter Strech* the ſaid tenements, with the appurtenances thereof, &c. as by the ſaid indenture between the ſaid *Richard* and *T. Chauntrel* of the one part, and the ſaid *Peter* of the other part made, more fully appears, the tenor whereof follows in theſe words: (77) *This indenture witneſſeth that Richard Phillips and T. Chauntrel, [as] ſurveyors general of all the dominions, manors, lands, and tenements of the Right Honourable T. Marquifs of Dorſet in the county of Devon, &c. have demifed, granted, and to ſerm letten unto Peter Strech, &c. for the term of ſixty years, rendering rent to the * marquifs, with a claufe of re-entry to the marquifs, &c. and with a claufe of warranty from the marquifs; and in witneſs thereof as well the marquifs as the ſurveyors ſet their ſeals, dated at London, &c. by virtue whereof the leſſee entered, &c. and then the marquifs died ſeiſed; after whoſe death the land deſcended to Henry late duke of Suffolk; as ſon and heir, who entered upon the land, and was ſeiſed in fee, and afterwards was attainted of high treason, by which forfeiture, and by virtue of the act 33. H. 8. [c. 20. §. 2.] the queen was ſeiſed in fee, and granted it by letters patent to the plaintiff in fee, which were ſhewn to the jury, and entered *verbatim*, by reaſon whereof the plaintiff entered; upon which ſaid plaintiff's poſſeſſion thereof the ſaid *Peter* and the other defendants entered; upon which entry the plaintiff hath brought this aſſize; and prayed the*

the advice and direction of the Judges, whether the grant and lease above made to the said *P. S.* be sufficient and good in law, or not; and if it be sufficient and good, then they say that no tenant of the freehold is named in the writ; and if it be not good and sufficient, then they say that the said *P. S.* and *W. S.* are tenants of the freehold. (78) And further they say upon their oath, that the said plaintiff was seised of the tenements in fee, until disseised by all the defendants to the use and behoof of the said *P.* and *W.* and assesses damages, &c. for the disseisin of the lands put in view and specified in the plaint, without regard to the abridgment. And for the difficulty the Judges adjourned the parties to *Westminster* in the exchequer chamber before themselves; and there at the day they adjourned them into *C. B.* and sent the whole record of the assize thither, &c. And last Term the said *P. S.* pleaded the death of *William S.* the joint-tenant (a) *puis darrein continuance*, &c. (79) First, Whether the lease be the lease of the marquiss or not? also, Whether the finding of it in *London* be void, or not? Also, Whether the words as surveyors shall have intendment that in fact they were surveyors, or shall only be similitudinary? Also, Whether the whole verdict be void in all, or only for the term, and then the finding of the residue, &c. of the tenancy of the freehold, and also of the seisin and disseisin, be good or not? Also it was moved that the patent to *G.* is not good without office found, notwithstanding the statute 33. *H.* 8. and this by statute 18. *H.* 6. [c. 6.] But a special act was passed for the attainder of the duke of *Suffolk* in the time of the now queen; wherefore seisin and real possession is adjudged in the queen without inquisition. Also, because damages are assessed for the disseisin of all the tenements put in view, and plaint, without having any respect to the abridgment of the plaint.

Dyer, 65. b.

[49. E. 3. 21. b.]
Plow. 178. Dier, 145.
12. Aff. 13.
[Bendl. 42. pl. 74.]

1. Aff. 16. 7. H. 7.
9. a. 5. H. 5. 2. b.
Plow. 128. 9. E. 4.
40. a. 37. H. 6. 3.
Dier, 33. a. 75. a.

5. H. 7. 2. a. 3. E. 4.
28. a.

1. Keble, 267.

B. N. C. 90. 1. 3. Co.
42. 11. 4. Mar. 145.
b. 16. H. 6. 6.

Dier, 172. b. Plowd.
486.

[Cro. Car. 427. 460.
3. Term Rep. 734.]

(a) By 17. Car. 2. c. 8. made perpetual by 1. Jac. 2. c. 17. death of one of the parties between verdict and judgment is not error, if judgment be entered within two Terms after verdict. And by 8. and 9. W. 3.

c. 11. §. 7. if there be two or more plaintiffs or defendants, and one or more of them should die, if the cause of such action survive to or against the survivor, the writ or action shall not abate.

Hall against Pyndar.

An action will not lie in the piepowder court on a contract made at a precedent fair.

If the amercement of the defendant in the judgment be omitted it is error.

[Jenk. cont. 5. c. 48.]

Kitchin, fol. 99, 100.

2. Inst. 221.

Finch, fol. 132. 10.

Co. 73. b. 37. H. 7.

Cr. 99. 1. Rol. Ab.

544. 2. Inst. 274. 14. El. 315. a. Dy. 75. 7. E. 4. 23. 2.

E. 4. 8. [4. Inst. 272. 3. Black. Com. 33. Wood's Inst. 490.]

(80) **E**RROR brought upon a judgment given before the mayor and bailiffs of *Cambridge* in last *Sturbridge* fair *. And the errors were assigned in this, That the plaintiff in the original action counted upon a contract and undertaking made in *Sturbridge* fair then last past; and no plaint was then begun in that fair. And the other was, Because no judgment of amercement of the defendant was given. And both the one and the other was holden to be error, by all the Judges of both benches.

(89) *M. 33. 34. Eliz.* entered East. 33. *Eliz. Rot.* 189. Error by *† Parker v. Onely*, upon a recovery had by *Onely v. Parker* in debt for performance of covenants, in the court of piepowders of *Canterbury*, and the style of the court was, "*Pleas bolden in the court of piepowder in the city of Canterbury*," without saying "*bolden in full market*;" and this by *WRAY, FENNER, and CLENCH*, was error, and judgment was reversed against the opinion of *GAWDY*, because the plea was concluded "*according to the custom of the said city*." Yet note 13. *E. 4. 8. b. pl. 2.* piepowders without market. And this book was not remembered by any one, which is *verbatim* against this resolution.

M. 42. and 43. Eliz. B. R. [Moor. 623. pl. 854. Cro. Eliz. 773.] Hall brought a writ of error against *Jones* on a judgment given in the court of piepowders of the market in the city of *Gloucester*; and the judgment was reversed, because the said words do not concern any matter touching the market, and therefore the court has no jurisdiction in it: and it also appeared there that they were spoken before the market.

Hil. 9. Jac. B. R. Rot. 231. In a writ of error brought by *Goodson v. Dreffield* [Moor. 830. pl. 1116.] to reverse a judgment given in the court of piepowders in *Rochester*, it was adjudged that such court by custom might have suit of bonds and other actions not touching the market, and often adjudged good here; and a judgment in *Hertford* court affirmed accordingly.

Venire facias there returned before the mayor and his deputy, is not good, because a Judge cannot make a deputy. Every plaint shall be entered in the same fair, and not before, or out of it. 8. *H. 7. 4. b. 10. Co. 73. Dyer, 75. 89. 315. 8. Co. 59. Beecher's case.*

Crompton's Jurisdiction, fol. 230. b. 272. concerning piepowder courts.

Michaelmas Term.

3. and 4. Philip and Mary.

After a grant of the next avoidance, if the parson make a lease rendering rent, confirmed

(1) **A** MAN, being patron of a benefice in right of his wife, granted the next advowson to another, after which grant the incumbent made a lease of the benefice for

(1) This lease is void in all. See 7. Co. 8. a. *Earl of Bedford's case.* Hob. Rep. fol. 7. *Spendlow v. Berker.*

the term of sixty years, reserving to himself and his successors less rent than the valuation in the king's book by ten pounds. And the patron, grantor, and his wife, and also the ordinary confirmed the lease; and afterwards the incumbent was deprived for marriage, and the grantee presented his clerk, who entered upon the lessee to avoid the lease. *Quære*; for the entry appears lawful.

by the patron and ordinary, and afterwards the parson be deprived for marriage, the grantee of the term presenting his incumbent, shall avoid the lease.
1. Rol. Ab. 479. Latch.
238. Inst. 46. a. 6.
E. 6. 72. b.
[Cro. Car. 582. 3.
Bac. Ab. 386.]

Basset's Case.

(2) **TENANT** in tail, remainder in fee to a stranger, the tenant in tail levied a fine with proclamations, and he in remainder died, his heir within age, i. of the age of five years, and then the tenant in tail died without issue, so that a title to an action of formedon in the remainder accrued to the infant, who suffered five years more to pass after the title accrued without bringing his action of formedon, yet he may have his action afterwards within age, notwithstanding the words of the statute 4. H. 7. [c. 24.] which saves and reserves the action or claim of the infant until his full age, and then he shall have five years, &c. And this was agreed by all the Judges of both benches, and MASTER BAKER and MASTER HARE, in the petition of right of *Basset*, which was in the nature of the formedon in the remainder; GRIFFIN, the *Attorney General*, being of a contrary opinion. Also it was moved, Whether in a formedon in the remainder the parol demurs for the nonage of the demandant, where the tenant does not plead any plea in bar, or not? for in the *Nottingham Eire* [3. E. 3. Fitz. Age, 72.] the parol demurred, because it was in the nature of a writ of right, where a fee-simple is demanded, and as heir: but 8. E. 3. [59. pl. 16.] is *contra*. More of this matter post. fol. 136. pl. 17.

A. tenant in tail, remainder to B. in fee, levies a fine. B. dies; his heir within age (A. dying without issue) may have his action at any time either before or within five years after he is of age.

V. Benl. 21, 22.
Jenk. Cent. 5. cap. 47.
S. C.
Dyer, 130. b.

[Cruise on Fines, 228.
253, 254. 3. Com.
Dig. 360.]

Plow. 365.
Br. Parol Demurrer, 4.
Co. 6. 3, 4.
Markal's case, that the parol shall not demur without plea pleaded.
Moor. 35.
18. E. 3. Age. 11.
12. E. 2. Age, 45.
145.

6. Co. 4. 34.

Daniel's Case.

* [133. b.]

(3) **THE** office of clerk of the prince's council-chamber at *Westminster*, and of the books and records there, was granted by the now king and queen to one V. for term of his life, who was disturbed in the exercise thereof by one *Daniel*,

Whether letters patent be good, dated on the 1st. Dec. in the 37th year of H. 8, when the warrant to the chancellor was dated 31. Oct.

37. H. 8. and filed among the warrants of that year, but indorsed to be delivered on the 1. Dec. only, without any mention of the year of his reign.

Dyer. 198. 277. Jenk. Cent. 4. cap. 65.
18. H. 6. c. 1. Plow. 491.
[See the marginal note to Plow. 492. 4. Com. Dig. 396. And see Bro. Cas. in Ch. Appendix, 578.]

Daniel, against whom he brought a *scire facias* to repeal a patent of king H. 8. made to him of the said office after the death of *Turner* the last clerk there; and the case was in chancery, s. that the warrant of the patent which *Daniel* had was under the privy seal, bearing date the last day of *October* in the 37th year of H. 8. and the memorandum of the delivery of this deed to the chancellor was indorsed as follows, s. "Memorandum, That on the first day of December in the year of the reign of king Henry 8. this bill was delivered to the lord chancellor of England to be executed at Westminster;" omitting the year of the king's reign, &c. and the warrant was filed among the warrants of the 37th year of H. 8. and the letters patent thereof bore date on the first day of December in the 37th year of H. 8. *Simile M. 10. & 11. Eliz. 4 fol.*

Principal and accessory condemned on an indictment for murder, and the accessory pardoned: Whether an appeal lies against him for the same murder, no principal being named in the appeal or alive?

Henl. 3. Co. 11. 31. 12. 1. Rol. Rep. 91. 3. Inst. 237. 131. 9. H. 7. 19. b. 3. Aff. 5. 4. Co. 43. b. 47. 1. H. 4. 5. b. 6. H. 4. 7. Dyer, 38. Lamb's Cust. of Kent. 545. [2. Inst. 184. 1. H. H. P. C. 625. 2. Hawk. P. C. 452.]

Rufford, Widow, against Smith.

- (4) *SPENCER* and *Coniers* as principals, and *Bennett Smith* and his wife as accessaries in procurement, were indicted and arraigned for the death of *Rufford*, and all four found guilty; and the principals were executed, and also *Bennett Smith* the accessory, notwithstanding his clergy, which was taken away by act of parliament in the 2. & 3. of the now queen [c. 17.] (a). And afterwards the queen pardoned the wife; and now appeal is brought against her by the wife of *Rufford*; and *quare*, Whether it lies against her, inasmuch as no principal is named in the appeal, or, in life?

(a) That was a private act to exclude *Bennett Smith* only from his clergy; but 4. & 5. P. & M. c. 4. takes it away in murder

and some other cases from accessaries before the fact.

May v. Milton et Al'.

Gavelkind land being devised to an husband and wife for life, remainder to the next heir male of their bodies; Whether the eldest son shall have the whole, or all take by the custom?

- (5) A MAN seised of lands in gavelkind in fee, by his last will in writing devised them to husband and wife for the term of their lives, the remainder thereof to the next heir male of their bodies lawfully begotten for ever; and afterwards the husband and wife had issue three sons and died: Whether

Whether the eldest son shall have the whole remainder, or in common with his brothers? was demurred in law in *B. R.* (a) and argued this and last Term by several. See of a remainder "*seniori puero*" in *Latin*, and in *English* in another deed "*eldest child*," and the father had issue a daughter the elder and a younger son, which of them shall have it, &c. *T. 16. Eliz. fol. 337. [a. pl. 36. post.]*

(5) A woman having issue a son took a second husband, and had issue another son, and the second husband devised his land to his wife for life, the reversion to the next of blood to the wife: the youngest son shall have the reversion, and yet he is not nearer in blood to the wife than the eldest son; But the intention must always be regarded, and for that reason he shall have it who is heir to the deviser. *Plow. Que. 35. 11. H. 6. 13. b. 19. H. 6. 24.*

(a) This is an estate tail in the husband and wife (see *Fearne Cont. Rem. 139, 140. Shep. Touch. 425.* and note () there;) and consequently all the sons take equally, as the custom of gavelkind extends to estates

tail. See *Mr. Hargrave's notes* (3) and (4) to *Co. Lit. 10. a.* and for this case *Robinson on Gavelkind, 95, 96, 97. 2. Black. Rep. 1228.*

(6) A MAN seised in fee before the statute 27. *H. 8.*

[c. 10.] enfeoffed divers persons in fee to the use of himself and his wife, and of the heirs of their two bodies begotten, and for default of such issue to the use of the feoffor and his heirs in fee. And after the statute they had issue, and the husband died, the issue within age. * It was moved, Whether he shall be in ward during the life of his mother? And SAUNDERS, Chief Justice, † thought he should: for he said that the fee-simple descends to him in the nature of a reversion, and not as a remainder, for the limitation of the use of the fee-simple was void, because he will have that by law without limiting it. (7) But yet *quære*; for I think that this use in fee-simple is created and raised *de novo* upon

In Cur. Ward'.

A. enfeoffs to the use of himself and his wife for life, and to the heirs of their two bodies begotten, remainder to himself in fee, and has issue; the issue shall take his estate as a reversion, and not by way of remainder.

Dy. 54. a. 163. a. 2. Co. 91. Plow. Query, 38. 32. H. 8. B. N. C. 186. 35. H. 8. 55. a. 28. H. 8. 12. b.

* [134. a.]

[1. Black. 22. 2. Stra. 1270. Co. Lit. 12. b. Mr. Hargrave's note (2).]

(6) Instead of this case, pl. 6. in the Abridgment, is written, "It was resolved by the Justices, that notwithstanding by 1. & 2. P. & M. c. 10. trials of treason should be according to the common law, yet there should still be two accusers on an indictment upon 5. E. 6. c. 11. Also in misprison for concealment of treason, there shall be two as well upon the arraignment as upon the indictment [1. H. H. P. C. 300.]. And the words of the statute 5. E. 6. *unless be voluntarily and without torture confess it*, shall be intended before the arraignment. And an accusation under the hands of the accusers or testified by others is sufficient; and if the accusation be of record, it is sufficient, though the accusers be dead." [1. H. H. P. C. 296. & seq. 2. Hawk. P. Cor. 365, 366.]

† According to this opinion of SAUNDERS the case has been ruled in the Court of Wards. *G. Tuke*, esq. seised of the manor of *Abbois in Essex*, covenanted in consideration, &c. with the daughter of *William Maurice*, esq. to stand seised thereof to the use of himself and *Margaret* for life, remainder to the right heirs of their two bodies, remainder to the right heirs of *G.* After the death of *G. Peter Tuke* by a first wife was in ward to queen *Elizabeth* for this remainder in fee, and *Bryan Tuke* the son of *Margaret* was inward to the queen also as ward on account of wardship; but note the difference (if there be any) between a feoffment to the use, and a covenant to stand seised.

a feoffment

- Dy. 237. Co.Lit. 22. b. a feoffment of land in fee, and was never in existence before. And if he had limited the use to his wife only for term of her life, the remainder of the use to the right heirs of the feoffor, the feoffor himself would have nothing in the use, but his right heir after his death shall be a purchaser as it seems. (8) And it is not like the case of *Bokenham* in 28. H. 8. [*supra*, 7. b.], for there *Bokenham* had feoffees to his use in fee, and the feoffees executed an estate in fee to the use of the wife of *Bokenham* for life, remainder to *B.* and his heirs, and *B.* died his heir within age; there perhaps the heir shall be in ward during the life of the mother, because the use limited in the remainder was void as a remainder, but it was the ancient use which was before, and so it descended in the nature of a reversion, and not as a remainder, &c. *Ideo quære bene.* (9) And supposing that the feoffor had this land by descent from the part of his mother, and died without issue, his heir on the father's side shall have the land, &c. But if he do not reserve or limit any use by express words to him and his heirs, but make a feoffment generally, then by the law the use shall follow the nature of the land, *s.* shall go to the heirs of the part of the mother only. And see this 5. E. 4. 7. b. and it is like a tenure specially created, and reserved before the statute of *Quia Emptores Terrarum*, of lands descended on the part of the mother, this shall enure to the heirs of the part of the father; otherwise is it where the law makes the tenure.
- [1. Term Rep. 630.]
- Flow, *Queries*, 133.
- Dyer, 99. b.
- [Doug. 777-779. Gilb. Uses, 17.]
3. El. 179. b. Co. 100. b. 7. H. 6. 4. 2. Co. 58. a.
- [1. Co. 127. 1. Will. 2. 66. 2. Str. 1179. 2. Will. 19.]
5. E. 2. *Avowry*, 207.

In trespass and justification under a freehold in *A.* replication that *B.* long before seised in fee, enfeoffed the plaintiff, whom *A.* disseised, that afterward here-entered and continued seised until, &c. is bad.

3. Inst. 25. Dy. 179. Liver de Entries, 582. 19. 37. H. 6. 28. 7. 11. E. 4. 3.

* [134. b.]

34. H. 6. 30. 11. Co. 51. 53. b.

(10) **I**N TRESPASS *de clauso fracto* the defendant pleaded, that the *locus in quo*, &c. is ten acres of land, &c. which are, and at the time of the trespass were, the soil and freehold of a stranger, and the defendant as servant, &c. To which the plaintiff replied, that a stranger before the trespass was seised, &c. in fee, and enfeoffed the plaintiff, by which feoffment he was seised until by the said stranger (in whose right the defendant justified) disseised: and that afterwards and before the trespass he made regrest and was seised in fee until the defendant on the day and year aforesaid committed the trespass, &c. And defendant * maintained his bar, and traversed the disseisin, upon which they were at issue. And now the jury was ready to try the issue, and by the opinion

opinion of the Court they shall not be taken, because the pleading above in the replication is bad, because he does not deny or traverse the freehold at the time of the trespass as above, but he ought to have alleged the trespass *meine* between the disseisin and the regrefs, &c.

[Bul. Ni. Pri. 93, 94. Hob. 98. Sed v. de Cro. Eliz. 540. Bul. Ni. Pri. 86, 87. 1. Bur. 107-114.]

Kirton *against* Birling and Trappes.

(11) **E**NTRY in the *quibus* in nature of assize. *Birling* pleaded non-tenure in abatement of the writ. *Trappes* took upon himself the entire tenancy, without this that *Birling* had any thing on the day of the suing out of the writ or at any time since; and pleaded a bar, s. the feoffment of one *Walker* and one *Hylton* to him in fee, and gave colour to the demandant by the same feoffors. The demandant, as to the plea of *Birling* in abatement of the writ, averred him and *Trappes* tenants of the freehold, as the writ supposed; and this he prays may be enquired of by the country, and *B. similiter*. And as to the plea in bar of *T.* he said that *William Kirton* his father was seised in fee until by the said feoffors disseised, who being thus in by disseisin enfeoffed *Trappes* as above; and afterwards *William* the father died, and the demandant as son and heir entered upon *Trappes*, and was seised in fee as in his remitter until by *B.* and *T.* disseised, &c. and made no averment of his plea in the conclusion, "and *this he is ready to verify, &c.*" To which *T.* rejoined as above in bar, and traversed the disseisin made by the said feoffors upon the father of the demandant, upon which point they were at issue: and at the day when the inquest appeared the demandant would have relinquished his first issue, because it was unnecessarily joined, since the demandant was not bound to maintain his writ, but might demur to the plea of non-tenure of the one and answer the bar of the other; and the maintaining the writ was only to the damage of the demandant; but notwithstanding this, the Court would not permit it. And upon the evidence to prove joint-tenancy it appeared, that *B.* before the entry of the demandant, was termor or lessee at will to *T.* and that he paid rent to him, and that he re-entered upon the demandant claiming the former estate; and by the opinion of the Court they are dis-

A disseisor makes a lease reserving rent; the disseisee re-enters, upon whom the lessee enters for his term, and continues to pay the rent to the disseisor; both shall be disseisors. And non-tenure by one is a bad plea, for they are both tenants.

[15. Vin. Ab. 182.]

22. H. 6. 44.

27. Ass. 32. 61.

1. E. 4. 6. 7. H. 6. 40. Dyer, 114. a.

8. 22. 37. H. 6. 13. 44. 16. 9. E. 4. 36. a.

Dy. 62. 87. a. 132. 141. 173. 178. 19. 34. H. 6. 22. 18. 14. H. 4. 18. 9. H. 6. 20. b. 14. H. 8. 12. a. 3. H. 8. 62. a. 5. E. 4. 35. 11. 28. 31. Ass. 21. 11. 33. 24. E. 3. 31. b. 10. Co. 87. 11. E. 3. Ass. 88. Pal. 203.

seisors

[11. Co. 51. 3. Cro. seisors and tenants, because the termor cannot qualify his own
540, ante, pl. 10. 1. wrong; &c. And at last a verdict was given for the plaintiff
Burr. 107-114, 2. Bac. on both issues, &c. and judgment given accordingly.
Ab. 99.]

M. 43. & 44. El. pl. 12. in C. B. it was agreed by WALMESLY and all the Court, that if a termor die, and a stranger claiming as executor enter upon the land, he is a disseisor, and cannot qualify his entry and wrong; and further, although he get the lease and sell it as executor, he is not executor of his own wrong, nor does his tortious disseisin qualify.

But by 14. H. 8. 12. a. and Dyer, 133. a. & 32. H. 6. 7. a. [abridged in Bro. Waste, 135.] If the disseisor claim only a lease for years, and the disseisee accept rent of him, now he may punish him in an action of waste, and the other shall be as a lessee. [See 3. Lev. 35.]

* [135. a.]

* Poyner *against* Chorleton and Another.

In *quare impedit*, if the (12) *QUARE impedit* brought by Poyner against Chorle-
jury neglect to find *ton* and *Charells*, clerk. The plaintiff entitles
whether the church be himself to the next avoidance by the grant of an abbot and
full, and of whose pre- convent, and the two defendants join in a plea, and entitle
sentation, and whether themselves by a subsequent grant of the next avoidance of the
six months are passed; same abbot and convent made to the said *Chorleton*, who at the
Whether the plaintiff next avoidance presented *Charells*, who was admitted and in-
may have a writ to the stituted by the ordinary, and traversed the first grant, upon
sheriff to enquire of which they were at issue: and at *nisi prius* the issue was found
those points? with the plaintiff, and the value of the church and rectory
found by the same inquest; but the jurors were not charged
to inquire of the other points, as is usual and right, *s. whether*
the church be full or not; and if it be, at whose presentation
it is full; and whether six months have passed from the time
when it began to be void; and these points were omitted by
the negligence of the plaintiff and his counsel. Also no
judgment was given for the plaintiff by the Judges at nisi
prius, as might have been done by statute West. 2. [13. E. 1.]
c. 30. And now in banc the plaintiff prayed a special writ
to inquire of the said three points omitted, directed to the
sheriff to inquire by the oath of twelve, &c. returnable, &c.
And it was well debated, Whether he should have it, or not?
And such a precedent is in Lib. Int. fol. 110. b. and that in
the mean time there should be a stay of execution to be had
of the writ to the bishop; and at length the plaintiff re-
linquished his damages, and had judgment, and a writ to the
bishop suo periculo, which note.

2. Keble, 409. Co. Mag. Chart. 424.

Dyer, 194. b. 241. a. 260. 6. Co. 48. 51. 11. H. 4. 80. Dy. 76. b. 20. H. 7. Cro. 57. 2. Rol. Ab. 722.

10. Co. 118. b. 119. The omission of that may be supplied by a writ of inquiry of damages.

[3. Mod. Ent. 246. 5. Com. Dig. 320. Bul. Nl. Pr. 123.]

Smithley *against* Chomeley and Others.

(13) **I**N *quare impedit* brought by Smithley *against* Chomeley and others, the plaintiff intituled himself to the next avoidance of the church by the grant of the true and rightful patron made to a stranger, who made two executors by his will and died; and the executors granted the said next avoidance to the plaintiff and all their interest therein, and that the church is now void, and averred this avoidance to be the next, &c. and this without *a proferet* of the letters testamentary of the first grantee. And as it seems, there is no need to shew them, because although they never prove the will, yet their grant of the advowson is good, and is an administration in law; wherefore, &c.

If an executor of the grantee of the next avoidance grant it over, his grantee may maintain *quare impedit* without making *a proferet* of the will.

7. H. 6. 1. a. 20. H. 7. 8. a. 3. H. 6. 46. a. 40. Aff. 2. Dyer, 29. b. 54. 115. a. 139. b. 13. H. 7. 19. Plow. 230. b. 11. H. 4. 84. a. Plow. 148. b. 8. H. 6. 36. 5. Co. 28. 1. Rol. Ab. 917. Went. 51.

[5. Com. Dig. 231. Office of Exec. 35, 36.]

(14) **I**T was enacted in the 5th and 6th year, of *Edward* 6. that the quarter sessions for the county of *Anglesea* in *Wales* should be for ever hereafter holden at *Beaumaris* only, and not elsewhere within the county of *Anglesea*, except on account of a plague, or other similar infectious malady; and the act was not printed; and notwithstanding the said act, the sessions were summoned, and holden by three of the justices of the peace at the town of *Newburgh* within the said county, not by reason of the plague, or such like other * *disease ut supra*; and there divers, s. forty persons and more were indicted of felony. And at the day of the sessions, the act of parliament aforesaid was shewn to the bench under the great seal of *England* exemplified; and was there read before the return of the precept by the sheriff and the opening of the books of the clerk of the peace, because the justices pretended ignorance of the act in their answers and examinations taken this Term in the star-chamber. And because they proceeded in the sessions without surceasing upon the view of the exemplification, they were fined by the council, s. each judge at one hundred shillings for the contempt. And by the opinion of several the indictments above are void, and *coram non iudice*, &c. And the case was again put in question by the mandate of the chancellor, T. 4. and 5. P. and M. and resolved by all the Judges of *England*, and the Serjeant and Attorney, &c. that the indictments above are void by reason of

The 5. & 6. E. 6. enacting that the quarter sessions of *Anglesea* shall be holden at *Beaumaris* only, and not elsewhere, an indictment taken at a sessions holden elsewhere is void.

[Jenk Cent. 5. c. 49. S.C.]

* [135. b.]

11. Co. 64. Palm. 542.

2. R. 3. 4. b. 396. Rol. Contin. 100. 11. Co. 64. 10. Co. 77. 38. H. 6. 7. a. 6. H. 7. a.

1. Co. 5. Plow. 207.

of the said negative prohibition, &c. *Vide simile, M. 33 H.8. [supra, fol. 50. pl. 1.]* for an office of the augmentations granted under the great seal of *England*, where by the statute for the erection of the court of augmentations, it shall be the seal of that court, and *Trin. 3. Eliz. fol. 203.*

Turton's Case.

In *quid juris clamat*, upon a suggestion that the defendant has a defence, but from age and infirmity is not able to travel, a *dedimus potestatem* may be granted to one of the Justices of *C. B.* to go to him and receive an attorney to appear and plead for him.

Lit. 570. 9. Co. 86.

Jenk. Cent. 4. ca. 93.

5. Co. 5. b. 1. H. 7.

27. 2. 11. H. 4. 28. b.

1. H. 5. 13. N.B. 27. b.

Plow. 207. 210. Dy.

212. 4. 50.

[3. Vin. Ab. 284. Fitz.

Nat. Br. 345.]

46. E. 3. Petition 18.

5. E. 4. 108. 9. 3. H. 6.

37. 22. 23. 4. H. 4. 2.

41. E. 3. 8. N.B. 25. 2.

26. L. 147.

(15) *QUID juris clamat* was brought against *Elizabeth Turton* widow, and after a distress awarded against her, she caused a special writ to be sued out of chancery of *dedimus potestatem* directed to SAUNDERS, Justice, supposing by the writ, that on the part of the said *Elizabeth* it was given the king to understand, that she ought not to attorn upon the fine aforesaid, because she has an estate in the tenements intailed upon her, and shewed the commencement thereof, and that she would plead this matter at the day in banc, but that she is so impotent and old, that she is not able to come into the bench without imminent danger; wherefore the writ commanded SAUNDERS Justice to go to her, and to receive an attorney to appear for her, and plead the above matter to the said writ. It was well debated, Whether this writ should be allowed or not? (for it was certified and returned served by the Judge at the day) for no precedent could be shewn for it. But in a writ of *per quæ servitia* there is a *dedimus potestatem* in the Register [fol. 168. a.] to receive the attornment of the party for a similar reason in the country. (16) And 43. E. 3. 8. [b. pl. 24.] of a recluse, such a writ as the above was allowed, as she could never appear in court. The law is the same for a woman enceint to be received by attorney, and this is only for a time; and also in the case where the land is to be lost; but it is not so here, for nothing here is to be lost but the issues; wherefore, &c. And at length by the opinion of the Court it was allowed. And a similar writ of *dedimus potestatem*, to receive a cognizance,* and certify the attornment of the defendants being husband and wife in a *quid juris clamat* brought by *Flowerdew* against *Coote* and his wife, was granted in chancery directed to *Robert Catlyne*, knight, Chief Justice, to hold pleas, &c. and returned served in *M. 3. & 4. Eliz. & curia inde*

* [136. a.]

inde advisare vult, for the precedent is rare ; and also all the writs of *dedimus potestatem* to receive and certify an attornment in the Register, are directed to one of the Judges of C.B. and not to any other (a).

(a) By 23. *El. c. 3. §. 5.* no attornment upon any fine shall be entered of record except the party mentioned to attorn therein first have appeared in the court in person or by attorney warranted by the hand of one of the Justices of the one bench or the other, or of one Justice of assize upon a writ of *Quid juris clamat, Quem redditum reddit*, or *Per quæ*

servitia, as the case requireth, and if entered it shall be void, without error &c. But now by 4. and 5. *Ann. c. 16.* all grants and conveyances thereafter to be made of any manors or rents by fine or otherwise, &c. shall be good and effectual without any attornment, &c.

Hilary Term,

3. and 4. Philip and Mary.

Basset's Case.

See supra, 133. pl. 21

Devon. Somers.
Gloucestr. Wilts.

(17) **ARTHUR Basset**, son and heir of *John Basset*, esq.

son and heir of *Sir John Basset*, knight, being within age, sued a petition of right for divers manors, lands, and tenements in the said counties, once the lands of the said *Sir J. B.* and recovered against him in 16. *H. 7.* by divers recoveries, which recoveries were averred in the petition to have been suffered to the use of *Sir Gyles Dawbeney*, knight, *Lord Dawbeney*, and the heirs male of his body begotten, and for default of such issue to the use of the said *Sir J. B.* and his heirs for ever ; and indentures declaring these uses were made in 20. *H. 7.* which was four years after the recovery. (Note this, and holden well enough.) And by the indenture it appeared that the said *Lord D.* for default of heirs male of his body, had authority to intail by his last will, or other writing made in his life-time, all the said lands in use, to any such two of the next of his blood, one after the other, as he should name, or appoint ; and for default of issue of their bodies, remainder over as above to *Sir J. B.* in fee ; but no mention was made of this indenture in the petition, nor was any negative allegation averred by matter of fact in the petition, s. that the said *G. Lord D.* had not made any

In a suit by petition to the king in the nature of a formedon in remainder for lands in the king's hands by attainder, which right of remainder descended to him from an ancestor who was remainder-man expectant upon an estate tail, the parol shall demur for the non-age of the petitioner. And although the ancestor died before he came to possession of the estate, yet the petitioner shall be in by descent. Where a deed giving a power to appoint is pleaded, if no appointment be made, it must be so averred ; *scilicet*, if the deed be not pleaded.

[Dal. 22. pl. 4.]
Dier, 133. Mo. 97. Dal.
in Keilw. 205. pl. 5.
[Dal. 37. pl. 4. Mo. 35.]
Jenk. Cent. 5. cap. 50.
6. Co. 4. Co. Lit. 77.
2 Rol. Ab. 782. 5. Co.
26. a. 9. 10. a. Dier,

166. Mo. 633. Dier,
335.
6. Co. 38. b.
Plow. 412.

* [136. b.]

Dier, 97, 98.

Byer, 111. Inst. 336.

6. Co. 3. 46.

18. E. 3. 23.

such nomination or appointment. (18) And by the better opinion of all the Judges, it ought not to be alleged, because no right or title was given to any person by the grant of such authority, if there was no execution of it. But if in the petition the indenture above had been shewn, or the special authority disclosed as above, then he ought to have averred in fact,* that there was no nomination and limitation of such estate tail by the said *Lord D.* or else this would be an impediment to this petition of right, which is in the nature of a formedon in the remainder for default of issue male of the body of the said *G. Dawbeney, &c.* Note this. (19) Also it was further alleged that the said *Lord D.* had issue *Henry* late Earl of *Bridgewater*, who discontinued the said lands by fine with proclamations in the first year of *E. 6.* to the late Duke of *Somerset* then being Protector, by force whereof first he was seised of an estate in fee. And by force of a statute made 32. *H. 8.* [c. 29.] the duke was seised of a special estate tail with divers remainders over (which was alleged with a saving of the titles of all strangers, &c.) of which estate he died seised; after whose death the act of his attainder 5. *E. 6.* [c. 9.] denied him to have such estate as was conveyed to him at the time of his purchase of this which was a fee simple, which estate of fee simple was by the act forfeited, and given to the king of such lands as were holden of him, as an escheat, but no mention was made in the petition of any title by escheat. But by the said act, all the lands of the duke were given to the king in fee (with a saving of all titles of strangers); and yet holden well enough; for the statute of 5. [*E. 6. c. 9.*] repeals the first act; wherefore, &c. (20) Also further was alleged a fine with warranty made by the mother of the petitioner, who is yet in full life, which warranty would have been collateral to the title, if it had descended; and this was alleged to enforce the right of the king. Also the death of *Sir G. Dawbeney* was alleged without heir male, &c. And note other exceptions in bar of the petition were moved upon the statute of *Fines 4. H. 7.* [c. 24.] *ut patet supra*, fol. [133. a. pl. 2.] And it was resolved upon all the exceptions, save only upon one, which was whether the parol shall be staid, or demur upon a plea pleaded in bar of the petition, and for no matter of any of the ancestors of the plaintiff, during the nonage of the plaintiff; upon which matter there was a demurrer in law. (21) And note that it

appeared by the petition, that this writ or action of formedon in the remainder was never given, or vested in any of the ancestors of the petitioner upon this intail, for *Sir J. B.* the grandfather and *J. B.* the father both died in the life-time of *Henry Earl of Bridgewater*, which was before title of action accrued to demand the remainder, so that although he makes his title to the remainder as heir, yet the action does not descend to him, &c. although it appears that the remainder was vested and executed in the said *John Bassett* the father by the statute 27. *H. 8.* [c. 10.] (22) And it seemed to me in the exchequer chamber, that the petition shall stay, &c. First the common * rule is, that an infant in all things which sound to his benefit, shall have favor and preferment in law as well as another man, but shall not be prejudiced by any thing to his disadvantage: and at common law, that in writs of right, entry *sur disseisin*, formedon *in reverter & descender*, *dum fuit infra etatem*, and *non compos mentis*, and all other actions real, founded upon a right descended to an heir within age, and in which seisin and esplees ought to be alleged in the ancestor whose heir &c. And the tenant by exception to the person of the demandant, so being within age, shall stay the parol until &c. without any plea pleaded in bar (a), but the writ ought not to abate as the statute of *Westminster* 1st. c. 46. [3. *E. 1.* c. 47.] supposes. (23) And therefore BRAC-
TON *libro quinto* [c. 21. §. 1. fol. 421. b.] says that a minor cannot act before his time within age, particularly in matter of right, or even covenant, but it must be deferred until he is of age, but the writ shall not abate. And he says [fol. 422. a.] that free socage cannot be demanded by an infant as heir before he be fourteen years old, and a knight's fee not before twenty-one; but at common law it seems, that in actions auncetrel possessory as *ayel*, *besayel*, and *cofinage* founded upon a dying seised of the ancestor, where it is not necessary to allege any (b) esplees, there the tenant cannot pray that the

* [137. a.]

6. Co. 3. Dier, 104. a.
34. H. 6. 4. a. 18. E. 4.
27. b. 42. E. 3. 22. b.
13. b. 12. E. 4. 17. a.
Co. Lit. 515. N.B. 192.
9. Co. 85. a.

Co. Lit. 77. b.

Statute of Gloucester,
cap. 2. 18. E. 4. 23. b.
6. Co. 4. Dy. 252. a.

[a. Inf. 291.]

(22) Where the parol shall demur for nonage of an infant. 3. *E. 3.* Fitz. *Age*, 71. that for nonage of the demandant the parol shall not demur, but 5. *E. 3.* Fitz. *Saver Default*, 69. *contra.*

• (a) If the infant would pray the parol to demur for his nonage it must be at the time of pleading, 4. *Term Rep.* 75. and in case of lands in fee descending on an infant, the parol shall demur in equity as well as at law, 3. *P. Wms.* 368. See 3. *Atk.* 118. *Caf. Temp.* Talbot, 198. But where error is brought on a judgment that the parol shall

demur, nonage cannot be again pleaded, 2. *Ld. Raym.* 1433. *Str.* 862. And of the privilege of infancy as to the parol demurring, see fully 3. *Bac. Ab.* from 152 to 165.

(b) But in a writ of right the count must shew an actual seisin by taking the esplees, 1. *Hen. Bl.* 1.

8. Aff. 12. Dier, 153 b.

[Booth. Real Act. 213.
1. Reeves' Hist. Eng.
Law, 336.]

West. 1. c. 46. 9. Co. 85.

26. 47. 1. Co. 15. Plow.
17. 2. Inst. 258.

21. E. 4. 15. 10. E. 3.
383. 27. H. 6. 1. 16.
39. E. 3. 26.

1. Rol. Abr. 137. A. 2.
142. E. 1, 2.

18. E. 3. Age, 10. acc.
12. E. 2. Age, 145.
18. E. 3. Age, 11. 6.
Co. 3. b. 13. Aff. 10.
11. H. 4. 94. a. 21. Aff.
4. 22. H. 8. 11. H. 18.
E. 3. 27. H. 8. 11. a.
27. E. 4. 2. b. 45. E. 3.
25. a. 13. Aff. 11. Age.
41. 21. E. 3. 23. Co-
rone, 114. 32. E. 3.
Age, 57. 22. E. 3. Br.
Appeal, 116. Stamf.
fol. 60. 32. 41. Aff. 8.
14. 2. Inst. 291. 12. H.
4. 10. a. 3. H. 4. 19. a.
11. Aff. 19. 10. E. 3. 19.
Age, 91. 9. Co. 85.

* [137. b.]

parol may demur for the nonage of the demandant without pleading a feoffment, or other thing, upon which the demandant by reason of the tenderneſs of his age cannot join iſſue; nor ſhall the circumſtances of things which may avoid the deed be inquired by the jury, as ſhould be done in aſſize of *novel diſſeiſin*, or *mort d'anceſtor*, which are juries at the firſt day. And for this the parol demurs, which is not remedied now by the ſtatute, and the inqueſt ſhall be taken as of any other man of full age. (24) But the ſtatute of *Weſt.* 1. is to be underſtood where the heir of the diſſeiſee brings freſh ſuit, and not otherwiſe by 24. *E.* 3. [47. a.] and alſo this ſtatute ſhall be conſtrued ſtrictly. For if the diſſeiſor enfeoff one who dies ſeiſed, his heir within age and in by deſcent, in a writ of entry in the *per* and *cui* he ſhall have his age, becauſe he is not the heir of the diſſeiſor; the ſame is the law of the vouchee or prayee in aid where he is received within age. And *E.* 3. in his 6th year [50. b. pl. 49. *Fitz. Droit.* 24.] brought a writ of right being within age of the ſeiſin of his anceſtor *Ric.* 1. becauſe the law adjudged him of full age; and tenant for life reverſion to a feme covert as heir, alienes in fee, the huſband within age, and his wife ſhall have a *conſimili caſu*, and the parol ſhall not demur, becauſe it is in right of the wife. In formedon *in reverter* by an infant as heir, the parol ſhall demur. An infant ſhall not have appeal of murder, but it ſhall demur until &c. or abate becauſe he cannot deraign. battel; yet in a writ of right it ſhall be deraigned by champions, and yet the parol ſhall demur, becauſe he cannot by intendment of law have diſcretion to find out his right aunceſtreſſel; otherwiſe it is if he be a purchaſer, and bring a writ * of right of his own ſeiſin, there the parol ſhall not demur, by 41. *E.* 3. [*Fitz. Age.* 39.] (25) The law is the ſame of an aſſize, and writ of entry in nature of an aſſize in *Mich.* 12. *E.* 4. [17. a. pl. 20.] he may defend his right as well as he could purchaſe. Alſo if an infant have a ſeigniorie by diſcent, and the tenant ceſs, or diſclaim in avowry made on his own ſeiſin, or if he be a baſtard, or attainted of felony, or die without heir, he ſhall have *ceſſavit*, writ of right *ſur diſclaimer*, and writ of eſcheat, to demand the land in lieu of the ſervices, and there the parol ſhall not demur, becauſe no right aunceſtreſſel has deſcended to him for the land, and it is reaſonable he ſhould have the ſervices paid to him, or the land in recompence, &c. And alſo although the

the ancestor, whose heir he is, cannot have the same action, yet the heir shall be delayed in his suit until he be of age. As in a writ of *dum fuit infra ætatem* of a demise made by his ancestor who died before his full age, or for the nonage of one of the demandants, the entire parol shall demur. The law is the same in *dum non fuit compos mentis*. So in formedon in the descender, the ancestor cannot have the action where he himself made the descent. And the heir in socage shall not have account against his guardian before his lawful age.

(26) Then it is to be considered in this case, which is in the nature of a formedon *in remainder*, that it is a writ of right, and no other writ will lie to recover the land; for the ancestor did not here die seised of the remainder, so he is not within the case of the statute of *Glocester* [6. E. 1.] c. 2. nor is he within the statute of *West*. 1. [c. 47.] because there never was any seisin in his ancestor. For after seisin once had, this writ of formedon in the remainder fails; and the count proves that the right remained, &c. And also the writ is *remanere debet eo quod, &c.* And also he demands a fee simple, which is the highest estate, and this he does as heir to his father, for bastardy is a good plea against him, or that he has an elder brother, or that his father was attainted, &c. And when he has recovered and re-joined the possession to the right, then he shall be adjudged in by descent as heir, and shall have his age, and be in ward; and this by 24. E. 3. [33. b. pl. 28.] and 33. H. 6. [5. b. pl. 16.] If he in remainder die, his heir within age, during the life-time of the particular tenant he shall not be in ward, because the lord is served by his tenant, but after his death he shall be in ward, and at full age shall pay relief, 40. E. 3. [9. a. b.] And a reversion is holden as well as the particular tenancy, and shall escheat to the lord, 3. H. 6. [1. a.] (27) And although in 8. E. 3. [59. b. pl. 16.] the parol does not demur in this writ, yet in HERLE's reasoning there is a fallacy, for he says he shall not be in ward when he has recovered, * which is not law; wherefore, &c. And in the Eire, 3. E. 3. [Fitz Age, 72.] the book is ruled that the parol shall demur, &c. And 48. E. 3. [33. a. pl. 23.] is a good case in *scire facias* to have execution of a remainder in tail under a fine by an infant as heir. *Quære bene legem.*

At another day DALISON, STAMFORD, BROWNE, WHYDDON, and BROOKE, *Justices*, argued that the parol

30. E. 3. 7. Age, 82. acc. 34. H. 6. 4. a.

1. Rol. Ab. 146. N. 6, 76
3. Bulst. 136. 2. Inst.
291. 1. Inst. 89. a.

Lit. 27. a. Dier, 133.
252. Marlbr. Cap.
Fitz. 118. b. Dr. & Stu.
14. b. Cro. 131. a. 17.
18. E. 3. 55.

N. B. 119.

Gard. 48. 37. 2. Co. 92.

11. H. 7. 19. a. 13. E.
4. 12. a. N. B. 142, 143.
H. 2. Co. 91. 11. E. 4.
11. 11. H. 4. 74.

28. E. 3. 99. 27. E. 3.
80. Gard. 23. Age, 116.
Mo. 36. Inst. 71.

* [138. a.]

6. Co. 3. 24. E. 3. 64. b.
23. E. 3. 22. Age, 100.
Vide the Eire in Darby.
A writ of intrusion
brought by an infant
against an abator upon
a demise of his ancestor, *Quære.*

should

Age, 116. Age, 10.

should demur. And BROOKE, *Chief Baron*, and SAUNDERS, *Chief Justice*, *è contra*; partly because in a petition of right, no book is ruled that the parol shall demur, but rather the contrary, as appears in 21. E. 3. [47. pl. 68.] and 43. Aff. [372. pl. 21.] *quare ibi*. And also SAUNDERS took for his argument the last judgments given in the *formedon in remainder*, s. 8. E. 3. [59. b.] and 18. E. 3. [3. a. pl. 9.] in *consimili casu*, and the case of aide prayer of three co-parceners within age in 24. E. 3. [32. a. pl. 16. continued 67. b. pl. 76.] see the books. And also the statute of Searches 14. E. 3. c. 14. is, that after the searches returned, they who sue for the king shall be put to answer, and to defend the lands and tenements so demanded against the king, &c. according to law; and that the Judges shall not let to do law, for the great or privy seal, &c. Wherefore, &c.

(28) Also the request to have the parol demur is too late, s. after office found for the petitioner; and so the process is gone too far to stay it now. And the peril of a collateral warranty which may descend during the demurrer of the parol is great to the infant. Also the issues which are taken for the petitioner by the attorney are all upon matter contained in the petition itself. And if a false verdict in these be given against the petitioner, he shall be well received to his attain. And the chief reason why the parol does not demur in a *formedon* in the remainder, is because it is in a suit to recover seisin and possession to himself where none of his ancestors before him, whose heir he is, had it, as in *formedon in reverter*, for it is only a purchase or contingent before it be executed, but after recovery he agreed he should be in ward. And also if the parol shall demur in this petition, *quare* what process shall issue at the full age of the heir to re-summon the parol, for a new petition ought to be made, for there was no summons made in the original, therefore no re-summons can be sued; *quare* this reason.

22. H. 7. 21.

2 R. 3. 23. b. N. E. 243. H.

3. H. 7. 13. 10. E. 4. 23. b. 6. Co. 38. 7. Co. 30.

The Duke of Norfolk's Case,

A. B. tenant for life surrenders land to the king in reversion to the intent, that he, his heirs, &c. shall give him others in recompence; the king alienes

(29) IT was enacted by parliament in the time of *Hen. 8.* that *T. duke of Norfolk* lately deceased, should have, hold, and enjoy for the term of his life, the manor of *Thorpe* in the county of *Norfolk*, remainder to *Henry* his son, late earl

earl of *Surrey*, and *Frances* his wife during her natural life, and to the heirs of the body of the said earl lawfully begotten, remainder over to the said duke and his heirs in fee to hold *in capite* of the king. The earl was attainted by verdict, and executed, having issue *T.* now duke of *Norfolk*, restored in blood only in the time of the now queen. The said countess during her widowhood by deed enrolled * gave, granted, released, surrendered, and confirmed to king *Ed. 6.* (having the said remainder in tail by the forfeiture) all her estate, interest, and demand in and to the said manor, to have to him his heirs and successors, *ea intentione* that he, his heirs, and successors should give and grant other their manors, lands, tenements, and hereditaments in recompence and satisfaction of the said manor. Afterwards the king reciting the afore-said attainder, and the said grant, or surrender, and also the attainder of the said late duke (which was declared in the time of the now queen void, and annulled by parliament) gave the said manor to *Sir T. Paston* and his heirs to be holden *in capite*. And also reciting by another patent, that whereas he was seised in fee of another manor of the said late duke, called *Sobam*, by his attainder, he gave it in recompence to the said countess for the said manor of *Thorpe*, which she accepted. And afterwards *Sir T. Paston* died seised, his heir within age, no office found in *Norfolk*, but of other lands of like tenure *in capite* in *Suffolk*; the late duke entered into both manors, and died seised, the countess re-entered into the said manor of *Thorpe*, pretending non-performance of the condition upon the said words *ea intentione*. (30). And it seems *ea intentione* do not make a condition, but a confidence and trust, for the words *sub conditione, ita quod, proviso*, imply the penalty of a condition broken, or not performed, without expressing it, but so does not *si contingat*, unless it be followed by a *tunc bene licebit*, or *et non licebit alienare statum*, without licence of the lessor *sub pœna* of forfeiture. So would it be if to the words *ea intentione* there had been added, *et si defecerit, quod tunc bene licebit reintrare*, this would have made a condition, and *Saint Jermin's* opinion in the second book of the Doctor and Student, c. 34. near the end accords. But *KNIGHTLEY*, *contra*, 27. *H. 8.* [qu. 27. *H. 8.* 15. b. pl. 6.] in a case of dower. (31) Also to prove that it does not make a condition consider the nature of a writ of *causâ matrimonii prælocuti*, such gift by a woman makes no express

them, and gives others in recompence, from which *A.B.* being evicted by a prior title, enters upon the alienee; adjudged, 1st, That this is no condition. 2dly, That there ought to be a request made to the king. 3dly, That there is yet time for the king to perform, and therefore that the entry is unlawful.

2. Co. 79. 27. H. 8. 15. b. 5. Mar. 163. a. Co. Lit. 204. a. Dyer, 93. b.

10. Co. 48. Dyer. 35. 163. a. 38. H. 6. 25. Co. Lit. 203. a. B.N.C. 152. Lit. 331. 330. 329. 328. [Shep. Touch. 119.] Dier, 66. 79. 1. Rol. Ab. 407. (C.) 5. Dr. & Stu. 122.

Quære, Whether the words "for the purpose" and "to the intent" in a last will make a condition, or not? H. 18. El. fol.

[Shep. Touch. 120. See Bac. Ab. Condition, B. Com. Dig. Devise, N. 9. 2. Br. Cas. Ch. 600.]

40. Aff. 13. 14 H. 8. 10. Plow. 413.

1. Rol. Ab. 407. (C) 6.
Co. Lit. 204.

[Shep. Touch. 120. 2.
Com. Dig. 438, 439. 1.
Bac. Ab. 396.]

1. Rol. Ab. 407. (C) 8.
6. H. 4. 8.

* [139. a.]

[Co. Lit. 208. a. Mr.
Butler's note (1.)]

1. Rol. Ab. 433. 439.
437. 8; 9. E. 4. 18. a.
45. E. 7. 13. b. 1. H. 6.
2. a.

42. E. 3. 10. a. 23. E. 3.
Recovery in Value, 12.
B. N. C. 66. H. Forme-
don, 18. 73 Co. 5. 91.
a. 24. H. 8. B. Tayl. 33.
10. Co. 38. a. Vet. N. B.
144. a. 48. E. 3. 9. b.
29 H. 6. 37. a. 7. H. 4.
40. a. Dier, 188. a.
Plow. 110. 17. E. 3. 12.
5. Co. 37. 38. Aff 7.

2. Co. 79. a. 41. 44. E.
3. 18. a. 9. 9. E. 4. 22. b.
19. H. 6. 69. a. 14. H. 8.
21. a. 21. H. 6. 41. a.
N. B. 135. a. 148. 348.

[Co. Lit. 208. 219.
Shep. Touch. 131. 132.
1. Bac. Ab. 425. et seq.
and 1. Br. Caf. Ch. 55.]

6. Co. 31.

45. E. 3. 21. Lit. 436.
Plow. 47.

condition without conditional words in the gift; which see 40. Aff. [241. pl. 13.]: consider also the writs of *cessavit de cantariâ, contra formam collationis, contra formam feoffamenti, &c.* And *eâ intentione*, and the conjunction *ut* with a verb following, and the preposition *ad* with a gerund following, s. *ut inveniat* or *ad inveniendum* or *per implen' ult' voluntatem* is the manner of the gift and not conditional, so that the donor may thereby regain possession to himself by BRAC-
TON [fol. 18. b. lib. 2. c. 6.] *de donatione sub conditione*, where there is the following line,

Scito quod UT modus est, SI conditio, QUIA causa.

But admit that it be a condition, then it seems that it was fulfilled by the grant and recompence of the manor of *Soham* by letters patent which are matter of record, and conclusion by acceptance thereof, and * this when there was no cause of recompence to be made, s. in the life-time of the duke. As if a reversion hath warranty, and upon aid prayed, or receipt, or voucher, the land is lost, and judgment to recover in value, yet *cesset executio ad valenciam* during the life of the particular tenant, 15. H. 5. [5. H. 5. 9. b.] (32) And although the recompence was of land of defeasible title, yet once recompenced is always recompenced; so if the demandant in a formedon be barred by warranty and assêts, although the assêts be afterwards evicted, yet the intail is gone for ever, *quare* this. But admit this be not a recompence, still the queen has time to make one, for the words after *eâ intentione* extend to the heirs and successors of king *Ed.* and *their* refers to each of them, and so time enough remains. And she is not bound to do this without request, as a man who has a warranty ought to vouch if he can; and if not to have a writ of *warrantia chartæ*, and this is upon request, &c. And also the recompence is to be made to one who is privy to the condition, wherefore the queen is not bound to it without request, otherwise would it be if it should be made to a stranger to the condition. (33) Also here is a dying seised, and a descent cast by *Passon* in the life of the duke, by which the entry of the countess is tolled, because she has only a right in the remainder; but the duke is not bound by this, because he was in prison, &c. so that he could not make continual claim, &c. And suppose the condition to be broken and request to have been made, and refusal of the queen, the countess has no remedy but to sue by petition, as well against the

the king's patentee, as against the king himself, if he were seised, where the king is entitled by double matter of record, 4. E. 4. [25. b. pl. 23.] and 10. H. 6. [15. a. pl. 19.] and no one may enter upon the possession of the king for breach of the condition, but is driven to his suit, for the land shall not be taken from the king without trial or matter of record, any more than it can vest in him without matter of record; wherefore, &c. And afterwards it was decreed for Lady *Paston*, and against the countess, because by the opinion of SAUNDERS and STAMFORD, *Justices of B. R. ex intentione* does not make a condition, and also the time of performance is not passed, and there ought to have been a request, &c.

14. EL. 313. a. 4. Co. 59. b. 4. E. 4. 21. b. Dier, 101. a. 102.

5. E. 4. 4. a. Plow. 239. a. 7. EL. 236. a. Stamford. 75. 21. H. 7. 33. Plow. 484. 1. Inst. 204. a.

[4. Com. Dig. 457. 3-Black. Com. 256.]

18. Co. 42. 2. Co. 79. Dyer, 319. 41. E. 3. 18. a.

Earl of Huntingdon against Lord Clinton.

(34) *A.* COVENANTS with *B.* to make to him before the Feast of *Easter* next a good, sure, sufficient, and lawful estate in fee-simple of and in his manor of *D.* discharged of all former bargains, sales, charges, and incumbrances whatsoever (*leases or grants for life, lives, or years, upon which the ancient and accustomed rents or more are reserved and payable during such estates, only excepted*). *Quære*, Whether a lease for years with the accustomed rent reserved of all the manor, or any parcel of it, made between the date of the indenture of covenant and the delivery of the deed, be a breach of covenant? And BROOKE, Chief Baron, SAUNDERS, WHYDDON, and Myself, thought not; but MORGAN and BENDLOWS were of a contrary opinion.

Of a covenant to enfeoff at *Easter* free from all former incumbrances (*leases, &c. excepted*), a lease made after the date, but before the delivery of the deed, is no breach.

[6. Vin. Ab. 428.]

1. Rol. Ab. 433. 2. Cro. 264. 1. Sid. 374.

3. 5. 10. H. 7. 4. 27. 19. a. 12. H. 8. 5. b. 29. Aff. 47. Perk. 31. a.

* Lord North against Butts.

* [139. b.]

(35) *T.* CRANMER, late archbishop of *Canterbury*, made a lease by indenture of parcel of his manor of *Harrow on the Hill* to one *Page* for the term of forty years in the 25th year of *H. 8.* and the prior and chapter of the church &c. confirmed it; and afterwards, *s. in 30. H. 8.* he granted an annuity of ten pounds, with clause of distress in the said manor, to *Dr. Butts*, physician, for the term of fifty years, which was also confirmed as above. *Butts*, by his will

Avowry for distress on a rent-charge for years granted out of a manor by an archbishop with confirmation, and devised back by the grantee to the archbishop to retain a certain sum, remainder to the avowant. Plea, a lease of parcel of the said manor, with confirmation, made to

the plaintiff prior to the said grant. Demurrer, and repleader awarded, Because,

1st, The avowry shewed no place of the delivery of the confirmation of the grant, and stated it to be by *the prior of the church of Canterbury*, without saying *cathedral*, &c.

2dly, The plea in bar did not shew the place of the confirmation of the lease, or make any protest of the lease sealed by the archbishop, but only of the lessee's part.

Styl. 286. 6. Co. 35. b. Ante, 110.

Dy. 29. 115. Plow. 81. 143. 5. 10. Co. 75. 92.

a. R. 3. 19. a. 1. E. 5. 3. 5. H. 7. 24. 6. E. 4. 11. 2. El. 171. b. Diar. 15. a. 39. b. 1. Co. 190. b. Plow. 149. 191.

Cro. Jac. 537. 22. 32. H. 6. 13. 19. Davis, 48. 5. E. 4. 7. 8. 14. H. 6. 16. Dett. 35. 10. E. 3. 11. Dett. 158. 12. H. 6. 5. Vifne, 64. 21. E. 4. 26. B. Faits, 73. & Lien, 63. accordant. But 9. E. 4. 39. Feoffments & Faits, 25. 8. H. 6. 6. B. Faits, 28. seem contrary. Plow. 5. 29.

Whether the devise of a rent-charge, and that not in writing, be good?

[See 29. Car. 2. c. 3. § 19.]

Dier, 135. a. Lit. 585.

34. H. 6. 6. Lit. 586. 21. H. 6. 5.

will made 37. H. 8. willed, devised, and declared, that the said Archbishop should have by way of retainer as much of the said annuity, with twenty-five pounds in arrear of it, as amounted to the sum of 100l: and if he should die or relinquish his archbishoprick, that then the residue of the annuity which should be to come should remain to *E. Butts* his nephew, to whom he gave and devised all his estate and interest in the same annuity: and then he died, and his wife, being executrix, delivered the deed of grant to the devisee, agreeing that he should enjoy the annuity. And afterwards *Page* leased the said land to *Sir E. Lord North* for the term of one year; and after the said year ended the said *E. Butts* (after the time of the levying of the said hundred pounds by the Archbishop by way of retainer) distrained the beasts of the said *Lord North*, and made avowry for a year and an half after the time of the levying of the hundred pounds. And the said *Lord North* pleaded the former lease made to *Page*, without shewing the counterpart of the Archbishop, but only the counterpart of *Page*, and under his seal. (36) And to the bar the avowant demurred; and took exception to the plea because no place was alleged where the confirmation was made: also because he did not shew the original lease, *ideo quare inde*. And it was moved for the plaintiff that the avowry was insufficient, first, Because no place was alleged where the confirmation of the grant of the annuity was made, but only by those words, "*as in the said writing of confirmation bearing date at Canterbury in the Chapter-house more fully appears*," which is not sufficient, for it might have been delivered by the Prior and Chapter in another place. Also it was alleged, that *the Prior of the church of Canterbury*, and the Chapter of the same place, confirmed, &c. without saying *cathedral*, or *metropolitan*, or *of Christ*, or *of the Blessed Mary*, or such like; which makes it uncertain what church, for there were then in *Canterbury* divers priors and churches; wherefore, &c.

(37) Also it seems the assignment of this term in the rent-charge by his last will and testament, and chiefly by this nuncupative will (for it is not expressly pleaded to be made in writing), is void in law; for the attornment of the tenant to this rent-charge, which is against common right, is requisite; and it is not reasonable his land should be charged by the act of the party without his own agreement; and a rent cannot be assigned or granted over without deed, because

because it is not a thing which lies in manurance, as land, &c. or as the wardship of a body, * or a villein, &c. Yet I agree that the executors of the grantee shall have it, and his administrators also, because they represent the estate of the grantee himself, and are assignees in law: so is it of a relief due to a lord; perhaps his executors shall have it, but by way of action of debt, and not by distress, &c. And also, a legacy of a villein by a termor, or of the body of a ward, perhaps is good enough, because they are chattels transitory, and not local, as rent is; wherefore, &c. And I doubt whether a writ of *quem redditum reddit* lies by the donee by fine of a rent-charge granted by one who has only a term of years therein. (38) And if a man have a rent-charge newly granted out of devisable land, *quare* Whether it be devisable by will or not, because it is to charge the tenant without his attornment. And also there is no prescription in the rent, &c. but if it escheat to the king by attainder, the king shall have it by his prerogative. And also for a rent-seck or a rent-charge for years no action at law lies against the terre-tenant, but only a writ of annuity against the grantor or his heirs or executors, or only a distress on the land, which the terre-tenant may always disappoint by letting it lie fallow.

(39) Also suppose the legacy and assignment to be good, still it seems the avowry is not maintainable, for the rent and annuity was suspended by the gift and legacy of one hundred pounds to the Archbishop, whose person was chargeable to it as well as the land; and a thing personal or suspended, or action personal suspended for an hour, is extinct and gone for ever, when it is by the act and consent of the party himself who has the thing suspended, and especially of a thing against common right as this case is. As if a woman obligee or obligor marry with the party, and then they be divorced *causa præcontractu*, the debt is extinct by 11. H. 7. [4. b. pl. 15.] ruled; but when it is by act of law it is otherwise, as in the case in 6. E. 4. [4. pl. 11.] where a man condemned in re-disseisin was imprisoned for outlawry of felony, and then pardoned, the execution on his body was suspended during the

22. El. 370. a. B. Gard.
118. Plow. 60. 61. 2.
Fol. Ab. 62. Pe. k. 60.
1. Rol. Ab. 915. 665.
4. Co. 49. 32. H. 8.
B. N. C. 176. 177. 11.
H. 6. 13. 15. a. 28.
H. 8. 24. a. 27. H. 8.
2. 20. H. 7. 1.
42. E. 3. 21. a. 9. H. 7. 16.

22. Aff. 78. 1. Keble,
43. 72. 15. E. 3. 19. b.
Dy. 4. b. 5. b. 46. E. 3.
2. 4. E. 3. 32. Dower,
113. Lit. § 585.
1. Rol. Ab. 609. 19. H. 6.
63. a. 9. H. 7. 9. b.
[Co. Lit. 111 a. Mr.
Hargrave's notes (3) &
(5) there.]

27. H. 8. 10. 9. H. 6.
9. 7. Co. 39. b. Perk.
132. b. 45. E. 3. 8. a.
F. Det. 129. 5. Co. 1.
38. H. 6. 28. b. 9. H. 7.
16, 17. Yelv. 208.

[An annuity cannot be
entailed as not within
the stat. *de Donis*, though
it may be granted in fee.
1. Br. Caf. Ch. 325.]

A thing or action personal once suspended by the act of the party is extinct for ever.

1. Cro. 373. Mo. 155.
Hob. 10. 21. E. 3.
Plow. 36. a. 12. b.
21. H. 7. 31. a. Cro.
122. b. 8. Co. 135.
26. H. 8. 7. b. contra.
10. H. 7. 24. 1. H. 7.
15. b. 2. Rol. Ab. 158.
4. E. 4. 8. b. 9. a. Dier,
124. 391. 38. H. 8.
60. b. Ho. 115

[Carth. 511. 12 Mod.
291. Salk. 325.]

[Fost. 61, 62. 1. Wilf.
217. Cro. Eliz. 96. 3.
Term Rep. 730. a. Hen.
Bl. 10. & note.]

(39) M. 43. & 44. Eliz. C. B. pl. 59. A. makes a lease to B. rendering rent at certain days, and B. was bound in a bond to pay the rent according to the reservation; and in debt for non-payment of the rent at a certain day B. pleads, that before the day on which the rent was in arrear, A. re-entered upon him; and upon demurrer it was argued for B. that although the rent be revived by his re-entry, yet the action being personal and once suspended is extinct: but it was resolved to the contrary, without argument, *per curiam*. [See 7. Rep. 24.]

21. H. 7. 31. a. 20.
E. 4. 8. 26. H. 8. 9.

time that he was prisoner to the king, but after the pardon it is revived. † And 21. H. 7. [23. b.] the obligee granted and covenanted with the obligor that he would not implead him for a year. *Quære inde.*

If a man having election to charge the person or the land discharge one, the law will discharge the other.

5. H. 7. 33. b. 2. Co.
36. N. B. 152. a. Plow.
13. a. Lit. 219.

[Vide 2. Vern. 144.]
Dier, 121. Inst. 286.

* [140. b.]

Co. Lit. 298. a. 3. E. 3.
Abridgment Assise, fol.
101. Title Grants. 7.
H. 6. 4. 3. 2. Rol. Ab.
115. Davis, r. 5. 3.
1. 3. Tit. Grant in the
Abridgement of Assises,
is contrary.

6. H. 6. 53. b. 50. E. 3.
1 b. 11. H. 7. 13. a.

[3. Com. Dig. 226.]

[Nor writ of right, 1.
Hn. Black. 1.]

Whether a remainder
of a term be good?

34. 39. H. 6. 41. 2. b.
10. El. 277. b. Dier,
74. l. B. N. C. 209.
8. O. 96.
[1. Burr. 282. 5. Burr.
2608]

Also there is another matter, s. a remainder of a term is not good: and if it be good, still there is a circumstance in the case (although it does not appear in pleading) which will defeat this remainder, s. the exchange of the said manor with king Hen. 8. after this devise, whereby he departed with

† Upon 21. H. 7. here cited, the following cases were put by Mr. CORTS of *Furnival's Inn*, August 1631: *T. 36. Eliz. Dowis v. Jefferies, C. B.* [Cro. Eliz. 351.] The defendant pleaded, that the plaintiff granted that he should not be sued before a Feast then ensuing, and adjudged a good plea. [4. Bac. Ab. 101. 266.]

M. 40. & 41. Eliz. & Hodges v. Cicill, Obligee and three obligors, a covenant that he will not sue one of them discharges all the others. † *Manning's Case*, A discharge of one acre discharges another.

(42) *H. 30. Eliz. Rot. 62 1. C. B. & Heywood's Case*. By WALMESLEY, *M. 43. & 44. Eliz.* If the grantee of a rent-charge take a lease for two years of the land, after the expiration of the two years he shall not have election to make this an annuity.

(41) *E. 6. Eliz.* by DYER, WESTON, CAREWS, and BENLOSE, that if the tenant enfeof his lord and a stranger, and they re-enfeof the tenant and his wife, the feignory is wholly extinct, for the land in their hands was discharged of the feignory, and by their feoffment the whole passes from each of them, they being joint-tenants. [See Bac. Ab. Extinguishment; and Com. Dig. Tit. Suspension.]

this term in the rent as discharged. As if a termor by his will devise his term to one for term of his life, remainder over, if the devisee for life aliene the term no remedy is given for him in remainder; wherefore, &c. And afterwards by the judgment of the Court it was awarded, that for the insufficiency of the pleadings on both sides the parties should replead.

1. Rol. Ab. 610. 28.
H. 8. 7. a. Dier, 184.
230. 277. Plow. 138.
522. 9. H. 6. 35. Br.
Repleader, 39. 1. Bulstr.
192. 1. Anderf. 168.
[7. Rep. 25. a.]

Gate against Wiseman.

(42) **MARY** the wife of *Sir John Gate*, lately attainted of treason, brought a writ of dower against *Wiseman*, who pleaded in bar the attainder in certain: to which she replied, that long before the attainder and the commission of the treason, and after their marriage, the said *Sir J. G.* was seised in fee of the land whereof the dower is demanded, and thereof enfeoffed one *A. B.* whose estate the tenant hath: to which replication there was a demurrer in law. And without argument at Bar or Bench, counsel being heard at *Lord Brooke's* chambers only, the demandant was barred of her dower by the opinion of all the Judges. See statute 5. & 6. *Ed.* 6. c. 11. in the last clause, that the wife of any man attainted of any manner of treason whatsoever *shall in no wise be received to ask, challenge, demand, or have dower of any of her husband's lands during the force of that attainder.* And *Stamford* thinks, that this extends to petit-treason also, fol. 195. And yet note the case above, that the lands aliened before the treason committed were never subject to any forfeiture or escheat, as in the case of *Vavisor* at the end of the chapter of Dower in *Littleton* (a); and therefore *A. BROWNE, Serjeant*, was very angry with the above judgment.

M. 3. & 4. P. & M.
Rot. 760.

The wife of one executed for treason shall not be endowed of lands which he aliened before the treason, though they are not forfeited.

[Benloe, 55. a. 91. S.C.]
Savil, 54. 8. E. 3. 20.
Plow. 262. Lit. 11. a.
Dal. 39. Dier, 263.
8. E. 3. 388. Dower,
10. 60. 1. Leon. 3.

Finch. 71. b.

M. 4. & 5. P. & M.
Rot. 470. Benloe alleges that she hath not dower.

(a) [Sec. 55. Co. Lit. 41. a. and see Mr. Hargrave's notes there.]

Whitley against Gough.

(43) **IN** TRESPASS between *Whitley*, widow, and *Gough*, there was a demurrer in law upon the evidence, where the husband of the plaintiff made a lease by indenture to the defendant for a term of ninety years, and afterwards enfeoffed certain persons, and took back an estate to himself and his said wife in tail; and afterwards the termor took a new lease of the husband for eighteen years only, to commence

A man makes a lease by deed, and afterwards enfeoffs and takes back an estate to himself and his wife in tail, and then lessee takes a new lease by parol, this is a surrender of the former, though the wife may avoid it after the death of her husband.

2. Rol. Ab. 495, 496.
Perk. 617. 37. H. 6.
18. a. 4. H. 7. 10. a.
22. E. 4. 37. a. Dier.
46. b. 280. Flow. 107.
24. H. 8. 15. a. 5. Co.
21. b. 6. 69. b.
[3. Bac. Ab. 460, 461;
4. Burr. 2210.]

mence immediately, by parol; and afterwards the husband died, and his wife ousted the termor. And by the opinion * of the Judges she may well do this, for the first lease was surrendered and merged in law by the acceptance of the second, &c. See *E. 3. Eliz.* fol. 200. pl. 62.

The grantee of a manor *dum sola* grants a rent-charge out of it, and afterwards the reversion of the manor descends upon her, and she marries: Whether she may avoid it?

[18. Win. Ab. §31.]

Hob. 161. 4. Leon.
140. Mo. 318. 324.
6. Co. 78. 7. Co. 14. a.
Litt. § 477.

(44) **K**ING Edward 6. granted to the present queen, by the name of the *Lady Mary* his sister, the manor of *D.* for the term of her life, according to the tenor and effect of the testament or last will of king *Henry 8.* which will was, that she should have the said manor as long as she should be unmarried: afterwards her Grace granted a rent-charge out of the said manor; after which grant king *Edw. 6.* died, by whose death the reversion came to her majesty; and then she married the now king: Whether the charge should remain now, or not, *quære.*

Easter Term,

3. and 4. Philip and Mary.

Cawstone against Cawstone and Others.

Upon a verdict on 8. H. 6. c. 9. that all the defendants forcibly entered, disseised, and expelled, and one of them only held out; all may join in attain upon the three first points, and the other may have his attain sole upon the detainer.

6. H. 7. 12. 3. E. 4.
29. 20. Com. 86. 14.
H. 6. 1. 10. E. 4.
21. Inst. 257. F. N.
B. 243. b.

(45) **W**ILLIAM CAWSTONE the younger brought a writ of forcible entry upon the statute 8. H. 6.

[c. 9.] against *William Cawstone* the elder, and seven others, supposing a forcible entry, expulsion, and disseisin, and also a forcible holding out, &c. to which the defendants pleaded not guilty. And it was found by verdict, that all the defendants were guilty of the three first points, and damages were assessed for them: but of the forcible holding out, none of the defendants except *William Cawstone* the elder was guilty: and for this point damages were assessed against the said *William Cawstone* the elder only, and costs entire against all. And for the first points all the defendants joined in attain in *B. R.* supposing by the writ that the jurors, by whom a certain inquisition was lately summoned, and taken before

before the Justices of the Bench by our writ between *W. C.* the younger, who sued as well for us as for himself, and the said *W. C.* the elder, and other defendants, for that the said *W. C.* the elder, and the others, with force and arms entered into one messuage, &c. and the said *W. C.* junior thence with force expelled and disseised in contempt of us, &c. without adding this, *s. "and him so expelled and disseised forcibly held out, and still do hold out;"* which clause was also in the original writ of trespass. And the assignment of the false oath was also only in the first (a) points, and found for the plaintiffs accordingly. And now plaintiffs prayed judgment against the defendant and the petit jury, &c. and on the last day of Term judgment was given for the plaintiffs in *B. R.* upon good consideration, although there was no mention in the writ of attain of the forcible holding out, for in this point all the plaintiffs were not found guilty, but *W. C.* the elder only, and then they ought to join in action on those points wherein they were damaged, and no more; and those were, the forcible entry, expulsion, and * disseisin, only. And for the other point, *William Cawstone* the elder alone ought to bring attain if he chooses; wherefore, &c.

11. H. 4. 27. 2. 45.
Ass. 41. 3. 4. H. 6.
30. b. 12. b. 30. Ass.
49. 30. E. 3. 1. b.

* [141. b.]

[1. Leon. 317.]

(a) Although the original writ or suit contained many points, yet the attain shall mention only the point on which the false oath was given. F. N. B. 241. note (c).

(46) **I**N replevin the defendant avowed for damage feasant; and the plaintiff and defendant were at issue; and afterwards the plaintiff was nonsuited: *quare*, Whether the avowant shall have his costs and damages, because the statute 7. H. 8. c. 4. gives costs and damages to the defendant in replevin, or second deliverance, where the plaintiff is barred of his action: and this also in avowry or cognizance made for rent, custom, or services; wherefore, &c. But this case is clear by the statute 21. H. 8. [c. 19.] of avowry or cognizance made upon the land, and not upon the person, which extends as well to nonsuits in (a) replevin, or second deliverance, as to where the plaintiffs are barred, and also as well where the avowry or cognizance is for damage feasant, or rent charge, as for rent service or customs.

On a non-suit in replevin for damage feasant, the avowant shall have his costs and damages by 21. H. 8. c. 19.

19. H. 8. 12. a.
4. H. 6. 12. b.
Plow. 82. Dyer, 180.

Dr. and Stu. 112. b.
Jon. 423. 435.
Ow. 13.

[Comb. 11. 5. Mod.
76, 77.]

(a) But in this action there can be no judgment, as in case of a non-suit. 1. Black. | 375. 3. Term Rep. 661.

Sir John Cutts *against* Sir William West.

If a disseisee enter, and the tenant of the disseisor desired by him so to do, re-enter and pay the rent to the use of his lessor, the freehold again vests in the *cestuy que use*, without express agreement after the disseisin.

[2. Bac. Ab. 102.]

Inf. 180. b.
Dyer, 134. b. 173. a.
1. Keb. 614.
Long 5to. E. 4. 60. a.
21. H. 7. 35. a. N. B.
178. G. 169. D. 15.
E. 4. 15. b. 14. Aff.
22. 22. Aff. 59. 34.
Aff. 12. 12. E. 3. Infant,
834. 3. 12. H. 7. 14. a.
14. b. 3. H. 7. 2. Traverse
de Office. Bro. 16. 18. H. 8. 18.
Cro. 116. 14. H. 7. 28. B. N. C. 506.

Whether the traverser of an office can be non-suit, *quæ*.

2. Rol. Ab. 130.

[3. Bac. Ab. 680.]

(47) A DISSEISOR made a lease for a term of years, the termor entered, and the lessor departed the realm; and at his departure gave commandment, authority, and request to the lessee, that if the disseisee made any entry upon him (as he mistrusted he would), he should not permit him to continue there, but always, as his termor, keep possession against him. And afterwards the lessor, being beyond sea, the disseisee entered upon the termor; and he re-ousted him, and paid his rent afterwards to the use of his lessor thus abroad. Whether the lessor be a disseisor and tenant of the freehold without express agreement to the disseisin after the disseisin made, *quære* in the case of *Sir John Cutts*, heir against *Sir William West*, in a traverse upon the dying seised of *Sir John Cutts*, who died at *Venice* 9th of *May*, 1. and 2. *Ph. and M.* for SAUNDERS, Chief Justice of England (who was made Chief Justice this Term) held, that without express agreement after the disseisin, the freehold is not vested in the *cestuy que use*: but the others thought otherwise.

And afterwards *West* who was the traverser of the office was non-suited when the inquest to try the traverse returned to give the verdict, and the non-suit recorded by the Court; *quære*, whether it be receivable by 22. E. 4. [9. b. pl. 26.] and whether it be peremptory by 4. H. 6. [12. b. pl. 9.]

A non-suit in traverse peremptory as in petition.

Dalaber *against* Lyfter.

He who has had three years possession being expelled, and restored by an indictment on

(48) NOTE, In the case of riot in the star-chamber, between *Dalaber* and *Lyfter*, it was holden for law, that if a man has been in peaceable and quiet possession three

(48) E. 38. *Eliz. B. R. & Leicester* was indicted upon 8. H. 6. — of forcible entry, and in the indictment it was stated that one *I. S.* was lessee for years, and that *I. N.* was seised of the freehold; and the indictment was, that he disseised *I. N.* and did not say expelled the lessee for years, and yet ruled good without alleging the expulsion of the lessee for years, for he is not in, only to have restitution.

T. 38. *Eliz. B. R. & Sir Matthew Arundel's* case. Indictment upon 8. H. 6. Copyholder for life leased for years to *B.* by licence of the lord; the lessee for years was ejected with force; the restitution shall be to the lord in whom the freehold is, and *B.* ought to sue in the name of the lord to have restitution: so the lessee for years in the name of him in reversion. [21. Jac. 1. c. 15. and 1. Hawk. P. C. 273. Dalton, ch. 132.]

three years and more by a good title, and is put out by force and disseised, and the party indicted thereof upon the statute 8. [H. 6. c. 9.] and the disseisee who was expelled is restored to possession by writ of restitution; and is in possession accordingly, that then he cannot justify a detainer of the possession with force by the proviso of the statute, because his possession was interrupted, and discontinued. And also in the said case, if the just and lawful possessor for twenty years be once removed out of his possession * clearly and absolutely, he cannot return with followers and force, to put himself into possession, and keep it with force by the proviso of the statute. Yet note the words of the proviso for the first case, which are these, s. "*that they may keep their possession with force who have continued in it for the space of three years, &c.*"

8. H. 6. c. 9. cannot justify keeping possession with force under that statute.

If the lawful possessor for twenty years be once clearly removed, he may not forcibly regain possession under the same.

23. H. 8. B. 32. 22. H. 6. 18. b. N. B. 245. Crom. 13. Cro. 187. 14. H. 7. 28. a. Hal. Pl. 139.

* [142. a.]

[1. Hawk. P. C. 289. 290. Sir Thos. Raym. 84. 31. Eliz. c. 11. 7. Mod. 138.]

If a termor be expelled with force, the reversioner cannot maintain an action upon this statute.

3. 8. E. 4. 28. 9. [2. Bac. Ab. 562.]

15. H. 7. 4. b. 6. H. 7. 12. b. N. B. 248.

And by the opinion of SAUNDERS, Chief Justice (who was made Chief Justice this Term), if a termor be put out with force, he in reversion cannot have an action upon the statute of 8. [H. 6. c. 9.] although this is a disseisin to him, because the expulsion is not done immediately to him: and the statute is copulative, s. "*put out and disseised.*"—Yet see the statute; for it is disjunctive, "*put out OR disseised with force.*"

E. 33. Eliz. *† Mathew v. Comber*, that the conclusion of the indictment shall be, "*and disseised him in reversion,*" or else the indictment is bad; and the restitution shall be made to him in reversion, and if he will not have restitution, the termor is without remedy, and so ruled; and that the course of C. B. is so, by all the clerks.

E. 36. Eliz. B. R. *per Cur'*. Lessee for years, if he be put out, shall not have an action upon 8. H. 6. nor he in reversion by himself, but they ought to join, and then restitution shall be awarded; and that the statute shall be recited as it is in the disjunctive, but the conclusion of the count shall be that *defendant was put out and disseised* in the copulative; It has been holden that in the roll of parliament it is put out *and* disseised in the copulative; but in the printed statutes it is in the disjunctive, put out *or* disseised. But in 41. and 42. Eliz. the copy of the parliament roll was brought into B. R. and it was in the disjunctive, put out *or* disseised.

Lord Paget against the Countess of Bath:

(49) A. B. seised of the manor of D: of the annual value of twenty-one pounds; holden by knight-service, assured by conveyance two parts of the said manor to a woman for the term of her life, whom (by the grace of God) he intended to marry. And after assurance made, he did marry her; and afterwards he sold the moiety of the third part, which remained in fee to a stranger, and died, his heir

Tenant by knight-service assured two parts of his land to his wife before marriage, and having sold the moiety of the remaining third part, died, his heir within age. Qu. Whether the lord may take any of the two parts to supply his full third.

D d

within

Dier, 122. 32. H. 8. c. 1.
 Raft. Wills, fol. 585. b.
 Coke, 6. 18. a. 8. 173. b.
 10. 82. b. 6. 10. Co.
 76. b. 84. a. Vide in-
 fra, 158. b.
 [12. Car. 2. c. 24.]

within age. Whether the lord by knight-service may take any part out of the said two parts to supply the want of the full third part, or not, *quære* for Lord Paget against the countess of Bath.

Lease reserving rent, payable at two certain Feasts, or in one month next after either of the said Feasts, and if rent should be in arrear after either of the said Feasts and days by the space of eight weeks, that then, &c. The eight weeks shall be reckoned from the twenty-eighth day after the Feasts.

[See] 10. Co. 129. a. b.
 3. Keb. 47, 48.

[See ante] 7. Ed. 6. 88.
 a.

[Com. Dig. Tit. Rent,
 (B. 9.) (D. 7.)]

(50) **A**LEASE for a term of years is made by indenture rendering and paying yearly forty shillings at two times of the year, viz. at the Feast of Saint Michael the Archangel, and the Annunciation of our Lady, or in one month next after either of the said Feasts by equal portions. And if it should happen that the said yearly rent of forty shillings or any part of it should be in arrear unpaid after any of the said Feasts and days before limited, in which it ought to be paid, by the space of eight weeks, that then it should be lawful, &c. Whether the eight weeks should be reckoned from the Feast-day of the aforesaid Feasts, or from the 28th day, s. the month next after the Feast, was much debated. And SAUNDERS, Chief Justice, and MR. WHIDDON, and divers others, thought that it shall be reckoned from the 28th day after the Feast, because that is more reasonably intended for the benefit of the lessee. And the 28th day is a day of payment at the election of the lessee, as well as the first Feast and day: *tamen quære bene è contra*; because no day and Feast certain is mentioned before, except the Feast-day, and the month is no day, nor comprehends any day in certain but a space and time, &c. And note the copulative, *Feasts and days*. And note those words "*in*" and "*at*."

† Cro. 123. It shall be accounted from the 28th day after the Feast,

* [142. b.]

Putbury against Trevilian.

Replevin for taking at L. in a place called W. cognizance that the place &c. was sixteen acres in L. aforesaid called W. that I. T. and A. his wife were seised in fee of lands in W. by C. in the parish of L. aforesaid whereof the place &c. is parcel, and suffered a recovery of the said lands in W. by C. aforesaid

(51) **S**ECOND deliverance was brought by one Putbury against T. Trevilian and others, supposing the taking at Littleham in a certain place there called Westward: the defendants, as bailiffs of Avice Trevilian, widow, acknowledge * the taking, &c. and say that the said place, &c. contained sixteen acres of land in L. aforesaid called W. and that before the taking one John Trevilian, Esq. and Avice his wife were seised of twenty-one meluages, two thousand

thousand acres of land, &c. with the appurtenances in *Wode juxta Chickestone*, within the parish of *Littleham* aforesaid in the county aforesaid, and in *Berinarber* in the county aforesaid, whereof the said place in which &c. is, and at the said time when &c. was parcel in their demesne as of fee; and being so seised thereof held the said sixteen acres of land among other things of *A. B. &c.* by socage tenure; and that *Anthony Pollard* and others, in the 23d year of *H. 8.* recovered by writ of *entry in the post* against the said *I. Trevilian* and *Avice* his wife, then being tenants of the freehold, the said twenty-one messuages, two thousand acres of land, &c. with the appurtenances, in *Wode juxta Chickestone* and *Berinarber* aforesaid, whereof &c. without saying any thing of *Littleham* in the recovery, and aver the recovery to be to the use of the said *I. Trevilian*, his heirs and assigns, and that the recoverors entered accordingly; and being so seised, the said *I. Trevilian* afterwards, s. on the 1st day of *December*, in the 23d year aforesaid, made his testament and last will in writing, and by the same willed and bound the said tenements in the recovery aforesaid specified, whereof &c. to the said *Avice Trevilian* then his wife for the term of her life, *if she should so long live sole*; and after the decease or marriage of the said *Avice* the remainder thereof to one *G. Trevilian* in tail, with divers remainders over, and at last to the right heirs of the said testator for ever; and that the recoverors continued their estate to the use aforesaid until the statute 27. *H. 8.* [c. 10.] by which statute *I. T.* was seised in his demesne as of fee, *and being so seised* before the taking &c. s. on the 10th day of *January*, in the 36th year of the said king *Henry 8.* died, after whose death the said *Avice* into the said tenements with the appurtenances in the recovery aforesaid specified, whereof the said sixteen acres of land in which &c. are parcel, before the said time when &c. entered, and was thereof seised in her demesne as of freehold; and because the aforesaid &c. for damage feasant, &c; without taking any averment that the said *Avice* named in the said recovery, and the said *Avice* in whose right &c. are one and the same person, and not divers, and without taking an averment *that she continued sole and unmarried according to the will, &c.* And to this avowry the plaintiff demurred in law. (52) And it seems the avowry is not good; for first;

(not mentioning *L.*), whereof &c. to the use of *I. T.* in fee, who devised the use of the said lands so recovered to *A.* his wife for life *dum sola*, remainder over: that afterwards by the statute of uses, *I. T.* became seised in his demesne as of fee, and died so seised, and entry of *A.* for damage feasant. And demurres, because, 1st, The place &c. is not comprised in the recovery 2d, It is not expressly averred that *I. T.* died *seised of such estate in fee*. Nor 3d, That *A.* continued *sole*.

The statute of uses was a revocation of the devise of an use, yet if after the statute of wills the testator had rehearsed and allowed the said will *by parcel*, it would have been a new publication, and the land had passed by the will.

Plow. 514.

3. Cro. 269.

Post. 300.

1. Leon. 243.

Dier, 242. 2.

Note, this averment was afterwards entered on the roll by consent.

[2. Mod. 93. 1. Mod. 217. Co. Lit. 42. a. Mr. Hargrave's note (8)].

(52) Hamlet or hamel is a member or part of some vill or town, as appears 14. Aff. 9. [41. pl. 8.] See Selden's Annotations upon Fortescue, fol. 27. [fol. 48. Edit. 1741.]

5. H. 7. 39.
2. Keb. 802.

Fit. Verdict, 29. Bro.
Verdict, 3. 7. 29. E. 3.
11. Brief. 905. 5.
E. 4. 8. 5. 8. 44. E. 3.
70. 68. 12. b. 20. E. 3.
Bre. 371. 29. Aff. 33.
Dier, 315. Sty. 77. 8.

* [143. a.]

[4. Term Rep. 352.]

1. Co. 57. 8. Dier,
146. b. 2. Rol. Ab.
779. Dier, 329. b.
[Co. Lit. 326. a.]

[2. Mod. 93. 1. Mod.
217. 2. Bur. 834. Cowp.
825.]

Note, this was amend-
ed since the entry, &c.
Dier, 141. a. 343. 7.
Co. 10. Plow. 32.
[Com. Dig. Pleader,
(C. 66.)]
Gouldf. 150.
Post. 269. 22.

Perk. 544.
1. Leon. 299.

Dier, 74. a. 9. 27. H.
7. 26. 19. 27. H. 8.
10.

Plow. 514.

the sixteen acres of land, which are in the place where the taking was are not comprised in the recovery; for the recovery is only of messuages and lands in *Wode juxta Chickestone*, within the parish of Littleham and Berinarker, which cannot be intended in Littleham, but in Wode or B. for Wode cannot be intended a hamlet in Littleham by reason of that word "*juxta*;" but *Chickestone* may well be so intended: and by *M. 8. E. 3. 21. [68. b.]* and *14. Aff. [40. pl. 8.]* the vill named before the *juxta* ought always to be intended a vill by itself and not a hamlet, and * also the vill named after the *juxta* ought to be intended a vill by itself, and not a hamlet; *quare well thereof*. And note the recovery had against the husband and wife being joint-tenants in fee, with averment to the use of the husband; *quare inde. (53)* Also it is not shewn that the said *I. Trevilian* died seised of an estate in fee-simple expressly, but by the implication of those words, *so seised, died, &c.* And the common pleading is, *and died seised of such his estate therein*. And by the statute of Explanations, 34. and 35. *H. 8. [c. 5.]* the deviser ought to have an estate in fee-simple, &c. Also it is not averred that *Avice continued sole* according to the condition, for this is an express condition, which ought to be expressly averred to be fulfilled, and kept, for it may well be intended that she has taken a second husband of the same name as her first husband was of; as many women have done: and no matter here alleged will prove that she was the wife of the deviser for the cause aforesaid. (54) Also the matter in law is, whether the will be good. And it seems not, for in the 23d year of *Henry 8.* when he was seised in use who made the will, the will was warranted by the common law, by reason of the confidence and trust. And then he need not make it in writing, but it would have been good enough by parol to convey the use to the devisee, but no land in possession passed from the deviser to the devisee by the equity of the statute *1. R. 3. [c. 1.]* which speaks only of feoffments, grants, releases, confirmations, recoveries, leases, estates, but says nothing of wills, &c. And before this will took effect, the statute *27. H. 8. [c. 10.]* condemned all wills of land, so that none was seised in use after this statute so that he could declare his will. And by a proviso in the said statute, all wills made and executed by the death of the makers, or which should take execution and effect

effect by death before a certain day in the said year, or in the year next following, are affirmed and made good, and no others. And then the said will of the said *I. Trevilian* was clearly void until the statute 32. *H. 8.* [c. 1.] which statute gives authority to every man seised of land in fee-simple of socage tenure, from the 20th day of *July* in the said 32d year, and in the year of our Lord 1540, to make devise, gift, &c. by his last will in writing, or by estate lawfully executed in his life-time, &c. And this to be understood of wills afterwards to be made, &c. And by this will (if it were warranted by the statute) the land itself ought to pass to the devisee. And it would not be so if the will at first (when it was made) had taken effect; wherefore &c. (55) But yet I will agree that if the devisor, before his death in the 37th year, had caused the will to be read and rehearsed, and had approved it, and declared it expressly to be his last will, then it would be good, and as a new will, &c. And by the making of the statute 27. *H. 8.* the said *Sir I. Trevilian* in law disagreed to the said will, for every man is party to the act; and then without a new agreement this will cannot be set up again; as the case is in 44. *Ass.* [296. pl. 36.]. A man made a will and devise of his land, and then disagreeing to it, * he made a feoffment, and took back an estate in fee and died; this land descends to the heir, and shall not pass to

1. *Roll. Ab.* 616, 617.

Plow. 504. 2. *R.* 3. 3.
44. *E.* 3. 33. 3. *Co.*
31. a.

Ante, 74. a.
Went. 32.
[*Gilb. Devise*, 201.
Com. Devise, (F. 1.2.)]

* [143. b.]

(55) *T.* 37. *El. B. R. Rot.* 632. or 613. and adjudged *M.* 37. and 38. *El. Bedford v. Parns.* [*Cro. El.* 493. *Mo.* 404. *Gouldf.* 150.] *A.* having four daughters, *B. C. D.* and *E.* and being seised of twenty acres in *S.* made his will, and devised all *b.s. land* in *S.* to *B.* and *C.* in fee, and made them executrixes, and afterwards he purchased other twenty acres in *S.* and a stranger came to the devisor, and offered to buy the twenty acres last purchased, and he answered that he would not sell them, but would have them go with his other lands to his executors, and afterwards he annexed a codicil of divers other legacies (but said nothing of land) of goods and chattels. Adjudged that *B.* and *C.* shall have the twenty acres, and that they shall not descend to the four daughters in coparcenary, for the intention appears by the answer to the stranger. But the chief reason for *FENNER, CLENCH,* and *POPHAM* against *GAWDY* was, that the annexing of the codicil amounts to a new publication (a).

M. 40. and 41. *El. B. R. & T. Harwitt's case.* A termor devised his term to *B.* and afterwards mortgaged the term, and redeemed it, and died; *B.* shall have the residue. If the devisor alienes and repurchases this land, and then dies, the devisee shall have it, by *WELSH.* [1. *Caf. in Ch.* 193. 1. *Salk.* 158. 1. *Vern.* 97. See 1. *Rep. in Ch.* 153. and per Lord Mansfield, Dougl. 39. an implied revocation may be rebutted by every sort of evidence.]

(a) If a testator annex a codicil concerning personal estate only, without any words in confirmation of his will, it shall not be a republication of it, so as to pass after-purchased lands. 1. *Vez.* 485. 2. *Vern.* 625. And 2. *Vern.* 722. seems to go further, for it is there adjudged generally that such a codicil is no new publication as to any lands. And since the statute of frauds 29. *Cur.* 2.

c. 3. no words spoken before or at the time of making such codicil can amount to a republication, for by that statute a codicil or other writing must be accompanied with the same solemnities as are required in the original will. See *Gilb. Devise*, 88. 97. *Dougl.* 31. 35. 36. *Cowp.* 158. 2. *Bro. Caf. Ch.* 291. 1. *Bur.* 549. *Ambl. Rep.* 574. 4. *Bro. Caf. Ch.* 41.

the devisee without exprefs agreement that he would his first will should take place. And in *M. 44. E. 3.* [33. a.] the case was, that a man seised in fee of land deviseable by will within an ancient borough made his last will when he had two sons, and when they were dead he aliened the land in fee, took back an estate in fee, and died; and without any new agreement to this will it was holden void, because the alienation was a disagreement to it, and without another new and exprefs agreement this shall not be taken as his last will, because it was once revoked &c. See *Fleta*, lib. 3. c. 3. [c. 14. §. 6. in fin.] *de distinctione cartarum*: a legacy is confirmed by the death of the testator only, as a gift between living persons by delivery alone. (56) Also the want of power or authority to make a will is tantamount to the non-ability of the person of the testator, as coverture, infancy, ideotcy, and lunacy; also duress or menace of imprisonment, although they become at large, &c. And a weak foundation destroys the work, and what was void in the beginning shall not by lapse of time grow valid. Also appointment of dower *ad ostium ecclesie* is confirmed by the death of the husband, and not in his life-time. Also a marriage before marriageable years is begun and not consummated till the age of fourteen by consent, 7. *H. 6.* [11. b.] And STAMFORD, *Justice*, was of the same opinion in every thing, but BROWNE *à contra*. And for the matter in law, BROOKE, *Chief Justice*, was also to the contrary, but of the word *juxta* he was of our opinion. And he was in some doubt whether the statute of 27. *H. 8.* was a repeal and revocation of the will, or not, but he argued that it was not (as then advised). And yet afterwards judgment was given for the plaintiff.

Re-hearsal and allowing of a will is a republication without new writing or dating it. Anon. Ben. 38. 1. And. 7. [Bendl. 131. S. C.] Plow. 514. b. Went. 37. 32. 1. Ro. 617. [29. Car. 2. c. 3.]

And in *M. 6. and 7. Eliz.* this case was revived in trespass, and upon not guilty a special verdict was found at *nisi prius* before WESTON and HARPER, but an addition to the case was found, s. that the said *Trevilian* the devisor, the 10th day of *January*, in the 37th year of *H. 8.* repeated, affirmed, and allowed the said last will without any new writing thereof, or being dated or made *de novo*. And by the opinion of the Court, s. of the four Judges, the plaintiff had judgment upon this will after an argument at bar and bench succinctly on the last day of the next Hilary Term.

(56) *M. 23. Eliz.* A. is imprisoned until he promises to make a bond, who makes it being at large, yet he may plead *per duress*, by MEADE [6. Mod. 85.] *M. 4. and 5. El. Rot.* 1041. between *Thomas Trevilian* and *Egedianus White* in trespass. *Benloe*, 131. pl. 191.

(57) **A** MAN being beyond sea out of the realm is disseised, and then returns into the realm, and afterwards departs back again, during which time a descent is cast. *Quære* well, whether his entry be tolled unless it be proved that he had notice of the disseisin when he was in the kingdom, for by intendment of law he could not have notice of the disseisin at the time when it was made, by *Littleton* in *Continual Claim* [§. 440.]. And see 9. *H.* 7. [24. a. pl. 10.] for the opinion, that if an infant be disseised * and at full age go beyond sea out of the realm, or take husband, or be imprisoned, during which time there is a descent, his entry shall be tolled by these laches suffered after his full age; but if he had been within age when he did such act, it would be otherwise.

A man being disseised while beyond sea, returns, and afterwards departs again, during which time a descent is cast; *quære*, Whether his entry be tolled, if it be not proved that he had notice while in the realm.

1. Brown. 231.

5. Mar. 159. a.

20. H. 6. 28. Plow. 366. a.

* [144. a.]

[Co. Lit. 259. a. 261. b. 1. Salk. 241. 4. Term Rep. 300. and 306. note.]

(58) **M**EMORANDUM, that on *Thursday*, s. on the 20th day of *May* in this Term, and in the year of our Lord 1557, I took the oath of a Justice of the Bench from *Nicholas*, archbishop of *York*, chancellor of *England*, together with letters patent of our lord and lady the king and queen, the tenor of which follows in these words: PHILIPUS & MARIA, *Dei gratia, rex et regina Angliæ Hispanorum Franciæ utriusque Siciliæ Jerusalem et Hiberniæ fidei defensores, Archiduces Austriæ, Duces Burgundiæ Mediolani et Brabanciæ, Comites Hapsburgi Flandriæ et Tirolis, omnibus ad quos præsentis literæ pervenerint, salutem. Sciatis quod constituimus dilectum et fidælem nostrum JACOBUM DYER MILITEM, unum Justic' nostrorum de Communi Banco, habendum quamdiu nobis placuerit, cum vadiis et fædis ab antiquo debitis et consuetis. In cujus rei testimonium has literas nostras fieri fecimus patentes. T. nobis ipsis apud Westm. 8. die Maii annis regn. nostrorum tertio et quarto.*

Grant of the office of Justice of G. R.

[See stat. 12. and 13. W. 3. c. 2. and 1. Geo. 3. c. 23.]

MARTEN.

per ipsos regem et reginam, Irrot in Banco eodem Termino, Rot. 712.

Sherleys's Case.

An alien friend may be indicted for high treason against the duty of his allegiance, and shall not have a jury *de medietate*.

Dal. 22. pl. 5.
Jenk. cent. 5. c. } S. C.
58.

12. El. 289. a. 304-357. b.
Fulb. Paral. lib. 1. fol.

87. Co. 7. 6. a. 26.

21. H. 6. 4. b. Stamf.

259.

(59) A FRENCHMAN called *John Sherleys*, who was one of the rebels with *Stafford*, who rebelliously took the castle of *Scarborough* in the county of *York*, now after *Easter* was here to be arraigned thereof in *B. R.* before the commissioners of oyer and terminer, and whether he shall be tried *per medietatem lingue*, s. of aliens French, or other aliens. And the statute of the staple 27. *E. 3.* [stat. 2.] c. 8. *sub fine*, was made for such aliens only as were merchants of the staple, who levied a plaint before the mayor of the staple, s. if both parties be aliens, the trial of the truth in issue shall lie by all aliens, and if between denizens, by all denizens; and if one party be alien, and the other a denizen, the moiety of the inquest or proof shall be by aliens, &c. But by the statute 28. *E. 3.* c. 13. §. 2. this is enlarged, and made general for all manner of aliens, merchants, or others. And in all suits and pleas as well before other justices as before the mayor, &c. And although the king be party, the moiety of the inquest or proof shall be by aliens, if so many be in the neighbourhood; and if there be not so many, then of as many as are there, not parties, &c. And this trial was used and ordered accordingly, as appears in 8. *H. 6.* c. 29. (being the last chapter of the statutes [of that year]) until there was restraint and impeachment thereof by colour of the act of 2. *H. 5.* [st. 2.] c. 3. that each juror in trial of death, plea real or personal, where the debt or damage amounts to forty marks, who has not land or tenements to the value of forty shillings by the year clear, is challengeable, the intent of which act was for English jurors, s. denizens, and in pleas between Englishmen and denizens, and not where aliens were parties or jurors, who cannot have freehold in this realm, nor are intended by *common jurors*, of whom the statute 2. *H. 5.* above

* [144. b.]

Stamf. 160. Dyer, 2. b.
34. H. 6. 5. 2. H. 7.
c. 3. Raft. Jurors, 9.

12. Co. 57.

[Co. Lit. 159. b. Mr.
Harg. note (1).]

(59) *E. 43. El.* [Cro. Eliz. §18. 841.] *Godwyn*, plaintiff, in *ejectione firme*, for a messuage in *Yarmouth* against *Cornelius Mounneigh*; and on the trial, upon surmise that the plaintiff was born at *Rotterdam* under the government of the States, and prayer therefore that the trial should be *de medietate lingue*, it was so. See the case before of *Julius Caesar* and *Cueteine*, fol. 28. a. note 181.

9. *E. 1.* A Jew had his trial *per medietatem lingue*, s. of Jews; and they were sworn upon the five Books of *Moses*, holden in their arms, and by the name of the God of *Israel*, who is merciful.

speaks,

speaks, as it is declared in the said statute of 8. *H. 6.* (60) But note the declaration was made only for the king, and the lords, and the commons are omitted in the words of the act; *ideo quære inde.* And it appears in the Abridgment of Fitzherbert, Title Inquest, *M. 3. E. 4.* [pl. 22.] (which I do not find reported in the year) [see 3. *E. 4.* 11. b. 12. a. pl. 3.] that the above statutes of *E. 3.* have been put in use always generally, s. as well where aliens, who are not merchants of the staple, sue, or are impleaded, &c. as merchants, by the trial *de medietate linguæ, &c.* But it appears by the opinion of this book, that the trial shall be by twelve free and lawful men generally, if the party who is alien, whether it be the plaintiff or defendant, will not pray the *venire facias* to be awarded *de medietate linguæ* as above. And this agrees with the *Lib. Intrat.* fol. 48. b. s. and thereupon the said *F.* says, that he is an alien, and was born in *D.* in parts of Germany under the allegiance of the Emperor of Germany: and he prays the writ of our lord the king to cause to come here twelve, &c. whereof one half to be of natives, the other of aliens, s. born in *D.* (a) in parts of Germany under the allegiance of the Emperor of Germany, to try the issue of the said plea according to the form of the statute in such case made and provided; and it is granted to him, &c. Therefore according to the form of the statute aforesaid, it is commanded to the sheriff that he cause to come here, &c. twelve &c. whereof one half to be natives, and the other half aliens, &c. as above, by whom &c. And because neither &c. to recognize &c. because as well &c. And in 21. *H. 7.* [32. b. pl. 23.] an alien, s. a Lombard was sued, and they were at issue, and there was no request as above made of trial, but a general *venire facias* awarded, and at the *distingas juratorum* the plaintiff for expedition (lest he should be delayed by challenge) shewed the matter, and prayed a *superfedeas* to the sheriff to stay it, and a new *ve. fa. de med. linguæ* according to the statute; and he had it; *quod nota.* (61) But *quære* if the alien be plain-

Plow. 79. 2. Dier, 59. b. Co. Lit. 98. 3. E. 4. 12. a. F. Enquest, 22. 8. Co. 18, 19, 20.

[See 3. *Bl. Com.* 360, 361.]

Dier, 28. 357. 3. E. 4. 12.

Dier, 304. Inst. 157. b.

[2. *H. H. P. C.* 271, 272. 2. *Hawk. P. C.* 591. 1. *Bl. Rep.* 517.]

(60) There were few or no preambles to acts of parliament before *E. 3.* when rarely you should have the commons mentioned in the act, and seldom is there mention of the lords, and yet as many appear by the rule of summons to parliament, they were all there present. Sometimes the ancient statutes are penned so generally that the king is not said to enact them. Sometimes the king only. Sometimes they are said to be enacted by the king and council. Sometimes other phrases.

(a) The statutes mentioning only aliens generally, the foreigner is not entitled to have a mediety of his own countrymen, but of foreigners generally. 2. *Hawk. P. C.* 591.

39. El. 357. b. 3 E. 4.
 12. a. See M. 13 [& 14.
 El. post. fol. 304. d. p.
 51.] for a Scotchman
 for a rape.

Statut. Præf. 159. a.

Mo. 557.

* [145. a.]

3. Inst. 27. Dier, 286. b.
 1. Treason, 23. 1.
 Ante, 132. a.

[1. H. H. P. C. 316.
 2. H. H. P. C. 271.
 Wood's Inst. 636. Fost.
 Cr. L. 337. and see the
 note there. 4. Black.
 Com. 352.]

7. Co. 6. b. Co. Lit. 129.
 33. H. 6. 1.

[See 1. Hawk. P. C. 50.
 and the book cited in
 the margin to sect. 5.
 there]

B. N. C. 487. 7. Co. 26.
 Dier, 28. a. 304.

Jen. Cent. 4. c. 18.

tiff and omit such advantage of request, whereby a general *venire facias* issues, and is returned, &c. whether by this he has not let slip his time. And *quare* Whether the Court *ex officio* ought to award the special writ above by reason of the above statutes, and it does not appear to them by the record that one party is an alien: and it seems not, for by the common law the trial was by all English, and the statutes were made for the benefit and in favour of aliens, if they will accept it, but they* are not compellable thereto. And in the principal case above, because the precedents have been searched for the trial of an alien for treason, and none can be found *de medietate linguæ*; and also by the words of the statute 1. & 2. P. & M. c. 10. *all trials of treasons to be awarded, had, or made, shall be made and used only according to the course of the common law of the realm, and not otherwise*; therefore a *venire facias* was awarded to the sheriff of York by the commissioners of oyer and terminer generally of *twelve good and lawful men, &c.* (62) And note in the case above the indictment was *against the duty of his allegiance*, when he was not a subject of the realm; but this is of no signification; in this time of peace between *England and France*, to levy war with other English rebels was sufficient treason; and if it were in time of war, he should not be arraigned, but ransomed. And note the attainder of *Charles Gavare* for the death of *Gambe* in the 3d year of E. 6. And in divers other precedents, the trial of aliens for felony and murder has been *per medietatem linguæ*, and still shall be. And the said *Sherleys* was found guilty by the said jury of the county of York; and had judgment of treason, but was reprieved, and afterwards pardoned, &c.

(62) Holden clearly in parliament 29. *Eliz.* that *Mary* queen of *Scots* being in this realm under the protection of the queen, and compassing the destruction of queen *Eliz.* was a traitor like another person who is a mere subject, and if she were indicted of this treason, the indictment should be as here, against the duty of her allegiance.

That neither *Scotland* nor the queen of *Scotland* is out of the allegiance of the crown of *England*, see *Morgan* of the Succession to the Crown from fol. 19. to 30. [See 2. Hawk. P. C. 91. sect. 41. 7. Co. 1. *Calvin's Case*, and the books there cited.]

Wife's Case.

To an information against the king's receiver for arrears of his account before auditors, (63) **A**N information for the king and queen was filed in *B. R.* by the ATTORNEY GENERAL against *Wife* a receiver of *Ireland* for a debt of two thousand pounds of the arrears

streams of his account adjudged before auditors assigned by commission, as I believe. And the defendant pleaded *nil debet per patriam*, to which the ATTORNEY GENERAL demurred in law. And it seems by 20 H. 6. [16. b. pl. 3. and 24. a. pl. 6.] and 21. H. 7. [14. a. pl. 20.] in debt upon the statute of Scavage [19. H. 7. c. 8.] taken against Sir William Capell that the issue is good enough. And by 43. Ed. 3. [1. b. pl. 3.] and 49. E. 3. [2. b. pl. 6.] the defendant shall have his law in such action, although he has accounted before auditors. But M. 13. H. 7. [3.] in debt *à contra*. And also it seems by the intendment of the statute 5. H. 4. c. 8. of the examination of the attorney of the plaintiff in debt upon arrearages of an account before auditors, that wager of law does not lie; but *nil debet per patriam* shall be received: *à contra* H. 4. 50. E. 3. against the warden of a prison for the escape of one condemned before auditors assigned.

he may plead *nil debet* to the country, but cannot wage his law.

20. H. 6. 17. 28.

[2. Lev. 106.]

Ley. 37. Dier, 20. 9. H. 5. 3. 4. H. 6. 17. a. 11. H. 4. 209. Lib. de Entryes, 147. 3. 5. 7. 21. H. 7. 33. b. 4. a. 14. 8. Sec 10. Co. 103. a.

[Co. Lit. 295. a. 3. Black. Com. 345. 348.]

* [145. b.]

(64) LAND was given to a father and son, and the heirs of their two bodies begotten, remainder over in fee, the father died without other issue than the son, and afterwards the son died without issue, and a stranger abated, or the survivor made discontinuance; *quære* * by PRIDEAUX, Whether he in remainder shall have one formedon or several? And SAUNDERS, BROOKE, and BROWN thought that one writ would serve well enough; *tamen quære bene*.

Land given to father and son and to the heirs of their two bodies, remainder over; the father dies, and the son discontinues, or a stranger abates, he in remainder need have but one formedon.

8. Co. 87. a. Dier, 99. b. Co. Lit. 183. 13. R. 2. breve, 645. 31. H. 8. b. [2. Bac. Ab. 589.]

14. 8. Co. 87. 17. E. 3. 51. a. Dier, 149.

The Bishop of Litchfield against Fisher.

(65) A BISHOP seised in fee of land in right of his bishoprick, made a lease for years, the lessee entered, and afterwards the lessor by deed indented, gave, granted, and

If a dean make a deputy by parol, and he in his absence with the chapter confirm a grant of the

(65) A dean may make a substitute for matter of jurisdiction, as for correction or visitation, but not for the administration, and therefore he cannot make a deputy to confirm leases, or to make speeches, to give advice to the bishop. Temp. R. 2. Fitz. Grants, 104. A deputy dean is the chief of the church, but cannot make leases with the chapter, 11. H. 4. [84. pl. 34.] 14. H. 6. 17. See Evan's Case, H. 22. Jac. Rot. 1164. [Palm. 457. Lat. 31.] and T. 3. Car. B. R.

By the stat. 26. H. 8. c. 14. [and 1. El. c. 1. §. 9.] the bishop may make a suffragan, and he shall have the same power as the bishop has, but he cannot confirm, for he has only a participation of the care, not a plenitude of power, 7. H. 4. 97.

Adjudged in the case of the dean and chapter of Fearn, Sir John Davis's Reports, fol. 47. that the substitute cannot charge the possession. And so the *quære* resolved *contra*.

confirmed

bishop; Whether it shall bind the successor? also *quere*, if the confirmation had been by the deputy of such deputy?

Lat. 238. 251. Dier, 58. a. 233. Dav. 44. 2. Ro. Rep. 91. 22. E. 4. 38. b. 22. H. 6. 43 a. 9. H. 6. 32. b. Dier, 123. b. 9. E. 3. 34.

[3. Bac. Ab. 381, 382. 1. Rol. Rep. 274. 10. Mod. 74. but 3 Mod. 147. cont.]

B. N. C. 94. 9. Co. 51.

33. E. 3. Verdict, 47. Lit. 48. a.

[1. Salk. 96. 1. Ld. Raym. 658.]

Dier, 152. b. 11. H. 4. 64.

confirmed the land to the lessee to have to him and his heirs for ever, rendering to the bishop and his successors ten pounds. And there was a letter of attorney in the same deed to make livery, and delivered the deed to the lessee himself, and livery was made accordingly. And the whole of this was confirmed by the dean and chapter in the life-time of the said bishop, the dean being absent in remote parts, but the president of the dean whom he constituted to hold his office by simple parol was present; and he delivered his keys together with the authority of the voice and assent of the dean: and this was entered in the register according to ancient custom. And afterwards the same bishop also granted and released the said rent to the lessee and his heirs: and this also was confirmed as above; but the dean and president also being absent, and the substitute or deputy of the president only being present, Whether the successor can avoid this grant and alienation of the land and of the rent, or either of them, was moved before the Judges in our inn, by command of the lord chancellor.

Lands vested in the king's possession by an act of attainder may be granted by him before office found, notwithstanding the statute 18. H. 6. c. 6.

3. Mar. 132. b. B. N. C. 90. 1. Co. 42.

21. E. 4. 58. a. 2. El. 172. b. Bro. Pat. 74.

[Cro. Car. 427. 460. 3. Term Rep. 734.]

2. Rol. Ab. 184.

(66) **I**T was moved for a question, If a man purchase land of the king and queen which was parcel of the possessions of the duke of *Suffolk* attainted of high treason, of which purchased land no office is found, whether the patent be void by reason of the statute 18. H. 6. c. 16. [c. 6.] (which enacts, *that no letters patent shall be made to any person or persons of any lands or tenements before inquisition found of the title of the king in the same, and returned into the chancery or exchequer, if the king's title in the same be not found of record, nor within the month after the same return, if it be not to them who tender their traverses for the farm, &c. and if any letters patent be made to the contrary they shall be void, and holden for none*), notwithstanding the act of his attainder vests the real and actual possession and seisin in the king without office found, and so does the statute 33. H. 8. [20. §. 2.] (67) And many thought that the patent above is good by the said words in *Italics* above, because the act of attainder is found of record in the chancery and exchequer. And I collect that the intent of the statute 8. H. 6. c. 16. [c. 6.] is to reform grants and leases

leases to farm made * by the chancellor, treasurer, or other officers of the king of the tenements of subjects found by office to be the right of the king, and seised into the hands of the king in the interim between the finding of the offices and the return of them; and not any grants or gifts in fee simple or tail, &c. And after this statute divers by subtlety and evasion construed the statute, that if the grants or leases to farm as above had been made by the above officers before the finding of the office, &c. this had been out of the statute; and to remedy this, and to make a clear declaration, the statute 18. H. 6. c. 6. provides generally in this part, that no letters patents shall be made to any person, &c. before inquisition of the title of the king in the same made and returned, &c. if the king's title, &c. *ut supra*, nor within the month after the return, if not to the traverser, &c.

Mo. 209. 294

Dier, 127. b.

Dier, 132. b.
Cro. 179.

Villers against Beamont.

Lincoln.

(68) **G.** B. W. B. R. B. N. B. great-grandfather, grandfather, father, and son: The great-grandfather being seised in fee in right of *Jane* his wife of certain land, he and his wife, before the statute 27. H. 8. [c. 10.] s. in the 12th year of H. 8. by indenture made between them and one R. C. demised, bargained, and sold the land to the said R. C. for thirty years without any rent to be paid, remainder to themselves for the term of their lives, remainder to the grandfather for the term of his life, remainder to the father, and to one *Colet* the daughter of the said R. C. and the heirs of their two bodies begotten, remainder for default of such issue to the heirs of the body of the grandfather begotten, without saying any thing more of the fee-simple. And for greater security of the use aforesaid they covenant and grant by the same indenture, that a common recovery in a writ of entry in the *past* shall be had against them by one *Sir John Rockley* and divers persons named, which recovery shall be to the said uses, and to no other intent, by reason of the bargain aforesaid, &c. which recovery was had accordingly. And afterwards the father and *Colet* were married together, and had issue the son aforesaid: and afterwards during the term of thirty years, and before the statute, the said great-

In assise it was found by special verdict, that *A.* being seised in fee of land in right of his wife, they bargained and sold the same by indenture for 30 years in consideration of 70l. remainder to themselves for life, remainder to *B.* their son, and *C.* his wife in tail, and suffered a recovery for further assurance; and it was also found *debors* the indenture, that the said assurance was as well in consideration of the marriage of *B.* and *C.* as of the said 70l. and that *A.* and his wife died, then *B.* died leaving issue; and afterwards *C.* with a second husband, levied a *fine come ceo*, &c. with warranty to a stranger. The issue, after the term, and within the five years, may enter under 11. H. 7. c. 20. this being a gift "by an ancestor of the *last end*" within that statute.

Ejectione firme by *† Wood* against *Turmade*, Trin. 3. Jac. B. R. was a like case.

grand-

Benl in Keil 208. a. S. C.

[Bendloe, 39. S. C.]

2. And. 47. Mo. 93.

1. Coke, 176. a. 7. 40. a.

11. Co. 24. 4. Co. 3.

4. M. Bendloe, pl. 6.

Co. Magn. Carta, 672.

B. N. C. 182. Brown

Entry Congeable, 140.

3. Inst. 326. b. 365. b.

grandfather and grandfather died; and the wife of the great-grandfather survived, and was seised for life by reason of the statute of 27. remainder to the father and his son in tail, &c. And afterwards the father died, and *Colet* survived and took a second husband, and she and her second husband during the term of thirty years levied a fine of the land to a stranger *sur cognizance de droit come ceo, &c.* with warranty of the fine in fee-simple, and took back an estate in fee to the second husband only. And afterwards, within the five years after the fine, and after the expiration of the term, the son entered upon the second husband, as the person whose interest and title, &c. by reason of the statute 11. H. 7. [c. 20.] against whom the second husband brought an assise of *novel disseisin*. (69) And he pleaded *nul tort ne nul disseisin*. And * the whole of this matter and the indenture *verbatim* were found by the jury; and they found out of the indenture, that the said indenture, bargain, and recovery, was had as well in consideration of the aforesaid marriage between the father and *Colet* to be had and celebrated, as of the said sum of seventy pounds; and prayed the discretion of the Justices, whether this was a *disseisin*, &c. And note, that no word of any marriage to be had between the father and *Colet* is expressed in the indenture, nor any word of any jointure to *Colet*: and also the words of the indenture are, after the mention of the recovery to be had, that the recoverors and all others should stand seised to the uses aforesaid (by reason of this bargain); and immediately follows, "*for the which manor bargained and other the premises the said R. C. co-venants to pay the said sum of seventy pounds at certain days, &c.*" so that the indenture does not express or purport any other cause, intent, or consideration, to tie the land to certain uses, save only the sum of money; so that no friendship or affection towards the parties moved the great-grandfather and his wife, *nisi sola regina pecunia*. (70) And also when the wife parts with her land, the intent, consideration, and cause, ought to be expressed by writing to prove her consent to the matter: and therefore it has been agreed to be law, that before the statute 32. H. 8. [c. 28.] if the husband and wife had leased the land of the wife for

* [146. b.]

7. 11. Co. 171. & 176. 25. a.

2. Keb. 163.

21. H. 7. 38. 26. H. 8.

2. Plow. 431. F. N. B.

192. 7. E. 3. 13. a. 7.

15. E. 4. 7. b. 18. 9.

H. 6. 44. a. Co. Lit.

If any parties to a fine die before recognizance thereof certified, it ought not to be certified. 1. H. 7. 9. 33. H. 6. 52. West's Precedents of Fines, fol. 46. § 156. [Cruises on Fines, 24. 30. 47. & seq. 2. Black. Com. 351.]

a term of years rendering rent by parol only, and after the death of the husband she had accepted the rent, yet she may oust the termor, because her privity to the lease ought to be by writing, &c. So if a feme covert suffer a recovery or fine of her land, this shall be intended in law to her own use, if the intent do not appear otherwise by writing expressly: wherefore here no intent or consideration can be averred or taken in this case other than the indenture limits specially, because the woman was covert at this time, &c. (71) And I take it as a ground of doctrine in our law, that when a sole and single cause or consideration or intent is expressed in a deed or writing of gift, grant, or feoffment, no other cause or consideration, or intent, shall be joined, mixed, or averred, by matter of fact *dehors*: and therefore before the statute of *Quia Emptores Terrarum* [18. E. 1. stat. 1.], if a man made a deed of feoffment without any cause or consideration, the feoffee should have it to his own use, because it was a tenure between the feoffor and feoffee; but since that statute, if no consideration be expressed, nor any money paid besides, it shall be intended to be to the use of the feoffor. The law is the same of a gift in tail at this day, &c. And if a woman at this day make a feoffment by deed for a sum of money, or for any other express consideration, or reserving a rent in fee-farm, she shall not have a writ of entry *causâ matrimonii* * *prælocuti* to suppose the cause of the gift to be marriage, for this is contrary to the deed. And therefore in *Trin. 1. E. 2.* [8.] in a writ of *causâ matrimonii prælocuti*, the tenant pleaded the demandant's deed against him, whereby the land was demised to a man and his heirs during the life of the wife grantor, rendering two marks of rent to her and to the chief lord, &c. judgment if for other cause than is comprized, &c. as it seems, the plea is good, yet it is not ruled, but yet there the deed does not comprize any cause of the demise expressly, &c. (72) The law is the same where an use is expressed in a deed; no one shall be received to aver a contrary use to what the deed purports. And in *2. E. 2.* this case is ruled in *ad terminum qui præterit* upon a demise by his ancestor the tenant pleaded the demise in fee-simple to one whose estate the tenant had, by the same ancestor of the demandant, whose heir &c. by the deed shewn to the Court. And the demandant would have averred his writ, of the demise for life, &c. and was not permitted, but he

326. a. 2. Co. 60. 58.
1. Mar. 91. b. 15. 8. 4.
17. a. 14. H. 8. 8.
Dier, 143. a. 2. Cro.
563.

[Cowp. 201. 483. Dougl.
50. Co. Lit. 215. a.]

[Dougl. 25.]

2. Rol. Ab. 781. 1. 2.
4. 7. Co. 176. 76. 3. 40.
36. H. 8. B. 284. 24.
H. 8. B. 60. Dier, 155.

[2. P.W. 204. acc. but
7. Ero. P.C. 70. 3. Term
Rep. 475. & 5. Term
Rep. 129. contra.]

Cont. 1. Rep. 176. 11.
Co. 25. /

27. H. 8. 9. a. Dier,
166.

[2. Lev. 77. 5. Com.
Dig. 622.]

Perk. 695. 14. El. 312. a.
Fitz. 205. b. Co. 2.
75. b.

* [147. a.]

8. E. 2. Entry, 78. 12.
E. 1. Feoffments, 114.

2. Co. 76. 2. And. 47.
[4. E. 2. 90.]

18. E. 3. 16.

41. E. 3. 22. Plow. 160. was driven to answer to the deed. And also in 41. E. 3. [6. b.] an annuity was granted to one who was a physiciant *pro bono consilio et auxilio suo impenso et impendendo*; but he was not named physician in the deed: and there in a writ of annuity brought against the grantor he pleaded this matter of his being a physician to prove the cause of the grant; and assigned a default in him, because being sick he requested the physician's counsel and aid, and he refused, &c. And there the plaintiff would have averred another cause of the grant of the annuity, s. for the resignation of a benefice to the grantor; and as it seems by the better opinion; he should not be received, for this is contrary to the deed of grant, &c. So there seems a diversity between this case and where a cause is expressed in a deed of gift or grant; there no other cause can be averred *dehors*, but if no cause be expressed; then a cause may be averred out of the deed. (73) Then it is to be considered here, Whether *Beaumont*, who is the tenant, and who is heir to the great-grandfather and his wife, shall be received to aver any other cause, joint or several; to be the consideration of those estates made in use, than is comprized within the indenture of his ancestors? And it seems not; and this for the causes above; but perhaps, if he were a stranger, it would be, &c. And then it is to be considered; whether the jury above by their verdict of "*as well + in consideration of the aforesaid marriage as of the said sum, &c.*" can find another joint cause out of the indenture; and it seems not any more than the party can do it: for they cannot find a thing contrary to that to which the parties are estopped or bound; and especially when they have found the indenture here *verbatim*, which comprehends all causes and considerations in law. And therefore so it was holden in 5. H. 7. * Next we are to see whether this case be within the words and meaning of the second branch of the statute of 11. H. 7. [c. 20.] s. "*or given to the said husband and wife in tail, or for term of life, by any of the ancestors of the said husband, or his feoffees in use, &c.*" (74) And it seems that it is not within the intent of the statute, although it should be within the words of it; which (but for the sake of argument) I will not allow that it is; for although it be not a gift in possession of the ancestor of the husband, yet it is in the † *donee*; and donees in use as well as in possession

† Orig. *de tam et quam*,† Orig. *d'non*.

are intended; and this by the express words of the statute, s. "or to her use, &c." Also the statute 32. H. 8. [c. 36.] of Fines has a proviso to except alienations of wives by fine of the land which they have of the heritage or purchase of their first husbands in possession or use, or of the ancestor of the husbands by gift or assignment. Note this word *assignment*, which proves the intent of the statute of 11. H. 7. [c. 20.] &c. And yet the limitation or assignment by the ancestors in the case above of the use in remainder is not within the meaning of the statute, because it was not a gift or assignment *causâ matrimonii prælocuti*; and this I collect from the words of the indenture above, where there is no mention or communication of any marriage, nor a word of any jointure, nor any covenant of any advancement to come to the husband from Colet or her ancestors. (75) And also the matter in itself proves that it was not meant to them for any jointure, because it is so far removed from any advancement of a livelihood for them; for it is not before the term of thirty years expired, and three lives more, which is a long expectancy for the present support and sustenance of the marriage. And I understand that in law, lands which are given *causâ matrimonii* are intended an advancement, whether they come by the woman who is married or her ancestors, or by the husband or his ancestors: and therefore land which is given by a woman upon communication of marriage to a man, and in hope of marriage, is given for marriage-fake, and if the trust fail the woman shall revoke her gift; the law is contrary where it is so given by a man to a woman. (76) Also land given to a woman in marriage, or in frank-marriage, by any of her ancestors, is given at the time of the marriage, or before, or after, but the marriage is the cause, and it shall be in advancement of the woman: and if they are divorced, the wife, that was the cause of the gift, shall have back the whole land. *Lib. Aff.* [19. 60. pl. 2.] And in this case the land is called and termed the marriage of the woman, be it free, s. clear of any services, or charged with service, it is a free and * natural disposition of the parents of the woman, and without money given or any other consideration; and these advancements came from the wife and her friends, &c. whereof the husband takes advantage also, &c. And there is another advantage that the husband takes by his wife, s. where the woman is seised of land in fee during the marriage, the husband

Hob. 151;

Fitz. 205. b.

6. H. 4. 2. a. 1 21. 5.
E. 2. Cui in Vita, 24.
4. E. 3. 8. Tayle, 8.
8. E. 2. Aff. 415. 10.
El. 272. Dier, 13. a.
ro. 104. 8. Co. 13. a.
Plow. 58. a. 3. Mar.
126. a. 19. Aff. 2. Perk.
48. 237. 12. Aff. 12.
12. E. 3. Verdict, 31
19. 13. E. 3. Aff. 83.
81, 8. E. 1. Aff. 415.

* [148. a.]

2. Rol. Rep. 68. Pal.
214

16. E. 3. Ayd, 129. 19.
E. 3. Ayd, 144. Lit.
Secd. 35. 52.

Dier, 143.

4. Co. 1. 17. El. 340. b.

2. Co. 86. 5. Co. 80.

4. 8. 11. E. 2. Gar-
ranty, 63. 81. 83. 14.
H. 7. 18. 28. Aff. 28.

3. H. 7. 3. 2. 14. 33.
H. 6. 6. 18. 14. E. 4.
Garranty 5. 87. 27.
E. 3. 89. 3. Co. 51. a.
1. Inst. 365. con. Lit.
§ 9. 732. Plow. 47. 58.
7. H. 4. 5. 19. H. 6. 9.

band thereby and from having issue by his wife shall have the estate for his life by the curtesy of *England* after the death of his wife, and this of the whole land of the wife. And *à contra*, gifts or dispositions which come from the husbands, or their ancestors, for marriage-fee, and from which the wives receive the benefit and certainty of sustenance, are the dowers assigned or jointure; and the difference between them is such, that dower cannot be enjoyed during the life of the husbands, but jointures *à contra*. (77) And for the most part jointures are made to the husband and his wife, or to the woman alone, which is also comprehended under the term Jointure before the Marriage, or after, for the sustaining of the present charges and necessities of the marriage; and these are made also *causâ matrimonii* and *gratis*, and not by reason of any bargain of money or any other consideration, but for parental love and affection, &c. And further I will make a resemblance and comparison between the statute of *Gloucester* [6. E. 1. c. 3.] of Alienation of the Tenant by the Curtesy, and this statute 11. H. 7. [c. 20.] for at common law warranty by the tenant by curtesy was collateral, and still is (as I understand), but it shall not be a bar in *mort d'ancestor*, *ayel*, or *cofsinage*, without assents in fee-simple descended in fact and reality, where before assents were only intended in law, &c. And this statute is strictly taken; for I conceive the law at this day to be, that if the heir do not enter upon the alienee in the life-time of the father, he shall be bound and barred of his entry by the warranty. (78) And the law is the same where the father is disseised, and releases with warranty, and dies, the heir shall be barred (without assents) of action and entry also, because it is not an alienation. Also in the last point of the statute of *Gloucester*, of alienation in the life-time of the wife of the heritage or marriage of his wife, if he aliene the purchase of his wife with warranty he is out of the statute, because heritage and marriage shall not be intended purchase: and for this see *Magna Charta*, c. 7. *de maritagio et hæreditate fæminæ*; and as that statute was made in restraint of the liberty of the tenant by the curtesy on the one hand, so is this statute of 11. H. 7. [c. 20.] intended to restrain the dowagers and jointresses of their alienations; but they are more cruel and strict towards the women who had no voices in parliament, for their alienations, discontinuance, release, confirmations, and common recoveries,

toveries, and warranties auncestral, are acts utterly void and nul, although * they leave assets, &c. And in one case, 3. 12. Aff. 9. where the wife is a jointress in tail, her warranty is lineal to the heir, and with assets before the statute was a bar, and not without assets; now by this statute of 11. H. 7. it is utterly destroyed, which is hard and severe: and therefore it seems this statute should not be taken kindly and liberally, but strictly; for it restrains the lawful liberty of women at the common law, and is not like the statute of 5. Ric. 2. [st. 1. c. 6.] for forfeiture to the next of blood of the wife, to whom &c. for consent to the ravisher, because that act is *malum in se*, and prohibited in law before, but this in the present case *à contra*, &c. But STAMFORD, BROWNE, and BROOKE, argued to the contrary, and that the plaintiff should be barred, because the entry of *Beaumont* was lawful by the statute 11. H. 7. for they expounded that phrase "*given by the ancestors, &c.*" to be any manner of way assured to the woman in jointure either for money (*as fewe marriages bee made nowe-a-dayes without it*) or else freely; and that the effect of that which is found by the assignment of "*as well in consideration of the said marriage &c. as of the sum &c.*" is contained within the indenture, and so their finding is no wife contrary thereto.

4. Co. 3. 2. Cro. 474. Mo. 93. Acjudged for the defendant, 1. Rep. 176. *Mildmay's case*.

[3. Com. Dig. 70, 71. Cruise on Recov. 155. 2. Bac. Ab. 92, 93. ut notis.]

Mo. 495.

See *Ashe's Bendloe*, 6. where it is said that it was adjudged within the statute 11. H. 7. t. 20. in the same case.

Trinity Term, 3. and 4. Philip and Mary.

Penicocke's Case. In Cur' Ward.

(39) *MARY*, late the wife of *Anthony Penicocke*, having an estate for her life in the manor of *Wadwalton*, the reversion thereof in fee simple to *Robert Penicocke* within age, and in ward to the king; took husband *Robert Charelton*; and afterwards the said *Robert* and *M.* were contented; and agreed to demise the said manor to one *T. Warren* for the term of fifteen years: and for assurance of that term; the said

Whether the acceptance of a fine for cognizance &c. granting and rendering back an office for years be a forfeiture of a life-estate in the premises.

[Cruise on Fines, 283. Bul. Nl. Pr. 100. 1. Term Rep. 738. 4. Leon. 217. 2. Bac. Ab. 281.]

Co. Lit. 252.

1. H. 7. 12. b. 42. E. 3.
20. b. 3. Keb. 687.
19. E. 3. Gard. 113, 114.
7. Co. 7. Dier, 262. So
adjudged 3. Rep. 51. b.
62.
[Wardship and its con-
sequences abolished by
12. Car. 2. c. 24.]

* [149. a.]

[2. Co. 56. 2. 1. Mod.
117. and see Cowp. 702.
1. Hen. Bl. 269.]

T. W. by fine acknowledged all the right which he had in the said manor to be the right of the said *R. C.* and *Mary*, as what they had of his gift, and released to the said *R.* and *M.* and the heirs of *M.* And by the said fine, the said *R.* and *M.* granted and rendered back to the said *T. W.* the said manor for the term of fifteen years, &c. Whether the acceptance of this fine be a forfeiture of the estate of *M.*; and if it be, then, Whether the king may enter, or have the profits of the land after the full age of the said heir, and livery sued. But note that afterwards, s. in *Trinity * Term 1. Eliz.* by a deed bearing date the 9th day of *January* in the 16th year of *Hen. 8.* it appeared, that *Mary* had an estate in tail; wherefore, &c.

This shall not be intended forfeiture within the statute 11. H. 7. [c. 20.] nor is it at common law, for acceptance of a fine does not make a discontinuance, 9. Co. 106. *Margaret Podger's Case.*

Upon *riens per descent* found against the heir who had aliened pending the writ, the judgment and *elegit* shall be general, and upon a return of *nihil* and the alienation specially, a new writ shall issue of all the lands, &c. which the defendant had on the day of *nisi prius*.

2. Rol. Ab. 70, 71, 72.
Plowd. 440. a. 17. El.
344. b. Dier, 175. 225. a.
B. N. C. 475. 34. H. 6.
22. b. 21. 40. E. 3. 9.
15. 18. E. 2. Exon. 341.
Finch, fol. 67. b.
[Reg. brev. jud. 25. b.]
1. Rol. Ab. 891, 2. 549.
42. E. 3. 11. a. 2. H. 4.
24. a. Dier, 207, 208. 7.
17. 21. 8. 3. 37. a. 17.
b. 51. a.

(80) **D E B T** against one as heir upon a bond of the ancestor, the defendant aliened the assets pending the writ, and pleaded notwithstanding *riens per descent* on the day of the writ purchased: and it was found against him, and a general judgment was given, and a general writ of *elegit* awarded of the moiety of all the lands and tenements of the heir, as of his proper debt, and without saying in the writ, *of the lands which he had on the day of the judgment given*; for the ancient form of an *elegit* was without limitation of time; and upon a special return of the sheriff, that he has no lands or tenements, but has aliened whatever he had, a new writ, upon a *testatum est* that he had assets pending the writ, shall issue to the sheriff to extend that which he had on the day of the *jurata* by *nisi prius*, because that day and the day in banc are all the same day in law (a). But *quære* if the alienation were found by inquisition upon the *elegit*, to be made pending the writ by covin, and this returned by the

(80) *Trin. 33. El. B. R. Rouse* brought debt against *B.* as heir, who pleaded *riens per descent* on the day of the writ; and found that before the writ brought he aliened the assets by covin to defraud that debt; and judgment for the plaintiff; and that it is well found for him upon office of assets by descent. [See Bull. Ni. Pr. 175, 176. & 5. Com. Dig. 213, 214.]

(a) By 29. Car. 2. c. 3. the officer shall set down the day of the month and year of signing judgments to be entered on the margin of the record where the judgment is entered, and such judgments shall relate against

purchasers *bonâ fide* for valuable consideration of lands &c. only to the time of signing, and not to the first day of the Term when entered, return of the original, or filing bail.

sheriff,

sheriff, whether a new writ shall not issue reciting this, &c. And BROOKE thought it should. And the writ and judgment (b) above were ruled by the opinion of the court of C. B. notwithstanding two precedents, one upon a *nihil dicit*, the other upon confession shewn to the contrary, in the time of E. MOUNTAGUE, s. That there shall be a special judgment, and writ of execution of the entire assets (which is hard as I conceive.) *Vide ante*, fol. [81. pl. 62.] See *East*. 15. *Eliz.* Rot. 1254. [Plow. 439.] Debt by *Saund*. [*Davis*] v. *Pepys*. [The defendant] confesses the action, but *riens per descent*, except so much in D. &c. And yet this is liable by the judgment, and writ of execution accordingly, as *East*. 40. *E. 3*. [15.] in debt the first case by WICHINGHAM.

Post. 341. Mo. 522.

H. 41. *El. B. R.* Rot. 447. *Barker* v. *Bourne*, [Cro. *Eliz.* 692.] In debt against the heir, if recovery upon *nihil dicit* shall be charged upon his own land. It was so done 19. *Eliz.* *† Lyon's Case*.

(b) But now see 3. & 4. *P. and M. c. 14*. §. 6. That upon this plea found for the plaintiff the jury shall enquire of the value of the assets descended. By which statute it seems the plaintiff shall only recover *pro tantis* with

respect to the value of such assets, and shall not have a general judgment against the heir as at common law upon this false plea. *Carth.* 354.

Hunt against Allen.

(81) **I**N affize by *Hunt* against *Allen* of the office of Registrar of the High Court of Admiralty of *England*, brought the last Term, the title was in the plaint. And the defendant prayed the affize to be taken; and one point thereof was, that *qualibet hujusmodi persona quæ nominata et assignata fuit* to that office (being vacant) by the high admiral of *England*, had and held that office as his freehold, s. for the term of his life, from time whereof &c. And it was found by the verdict, that one *Watkins* and the plaintiff were named and assigned to the said office, being void, by *William Fitzwilliams*, knight, then being high admiral, by his deed sealed with his seal, &c. and that *Watkins* * died, and the plaintiff survived, &c. and Whether this will support the above prescription, because the prescription is in the singular number, s. *qualibet hujusmodi persona*, and Whether this shall be taken strictly only to one person, (which suffices for an entire office, &c.) was much debated; and the case of *Fogge*, chief clerk, viz. *custos brevium* of the common pleas in 18. *E. 4*.

In affize of an office, whether a prescription pleaded in *qualibet persona quæ nominata fuit* by A. B. is supported by a verdict finding a nomination of two. And the plaintiff making title by a nomination of himself to the office, a verdict finding the nomination of himself and another for their lives, and that the plaintiff is in by survivorship, will not support it.

[Benl. 50. S. C.]

* [149. b.]

Dier, 114. b. 153. 35. H. 6. 7. 7. E. 4. 29. 2 H. 7. 11. b. 15. Aff. 3. 10. Co. 61. 103. 22. H. 6. 48.

[Lut. Nt. Pr. 76. Cro. El. 336. But here it seems he ought to make title, 3. Mod. 273. 1. Sid. 73.]

Dier, 151.

[1. Show. 289. 11. Co. 3.
4. 3. Bac. Ab. 737.]6. E. 4. 8. b. 9. E. 4.
11. a. 7. 11. 21. E. 4.
29. 11. 20. & 81. 11.
Co. 3. b. 1. Inst. 164. b.
8. E. 4. 17. a. Dier, 259.
a. Vaugh. 256.

[7. b.] which was granted to two, i. the father and son, was cited by the defendant, for the Justices would not there allow the patent of the king to encumber the place, and because there cannot be two chiefs in one office. And yet Bagott's assize [9. E. 4. 5. pl. 20.] proves the grant of the king of the office of one of the clerks of the crown in chancery to two, good, therefore *quære*. See a better and fuller report of this case *postea fol.* [152. b.] and note by Fitzherbert in *Nat. Brev. fol.* 231. in *corodio habendo*, that corody certain may be granted to divers, but a corody uncertain to one only, more *fol.* 152. b.

Bedyll against Holstoke.

An use was limited to a man and woman and the heirs of their bodies before the statute of uses, who afterwards intermarry; then the statute passes; still they have several moieties, and if the husband aliene, the wife at his death can only claim a moiety, though the issue may have fornedon for the whole.

[Gouldsb. 148 pl. 72.
and see] Co. Lit. 187. b.
N. B. 194. Dier, 54. a.
293. a. Plow. 483. [58.]Co. 102. b. 2. R. 2.
Remitt. 12. 35. 40. Aff.
157. 36. E. 3. Cui in
Vil. 20. 45. E. 3. 5. b.
9. E. 4. 37. b. Dier, 128.
145. 4. Leon. 198. A. o.
92. 29. H. 6. 45. b. a.
10. Co. 68. 102.
Feoffments, 98.

Dyer, 290. a.

(82) **I**N replevin between *Bedyll* and *Holstoke*, the case was: That a feoffment was made before the statute 27. [H. 8. c. 10.] to the use of a man and a woman unmarried, and of the heirs of their two bodies begotten; and afterwards they intermarry, and after the marriage the husband bargains, and sells the entire land in fee to one of his own feoffees, and dies without issue, and then the statute of 27. was made; the wife claims the whole by the survivorship as tenant in tail after possibility &c. And by the opinion of the whole Court without argument, she can only have the moiety, because the husband and wife shall have moieties like joint-tenants by reason of the jointenancy made before marriage; and yet as to the issue in tail, if there be any, he shall have a fornedon of the whole, &c, which note; and so it was ruled as above.

The same case in effect was in the assize of *Fuljambe* against *Lynacre* in the county of *Derby*, 4. & 5. P. & M. [1. And. 303.] and the opinion of the Judges of assize was the same there. And *East*. 8. *Eliz.* in *C. B.* between *Morgan* and *Wharton* to the son upon evidence in a writ of *quibus* the same case in effect saving the alienation of the husband being made after the statute of 27. And the opinion of *WELSHE*, *BROWNE*, and *DYER*, for the moiety of the husband was as above, And the verdict was given accordingly

This is the true reason of this case, which was the difference between that and the case in *Plow.* 483. 20. b. of land recovered in value during the coverture there shall not be moieties, although they have moieties in the land recovered against them. *Plow.* *ibid.* *Nicoll's* case.

by a jury of the county of *Bedford*. But *WESTON* *contra*, s. that the statute vests the possession to the use, as a purchase made to the husband and wife during the coverture, which the other Justices denied from the words of the statute, s. *form, quality, condition, &c.*

* Parker against Gravenor.

* [150. a.]

(83) **B**ETWEEN Parker and Gravenor the case was :

A lease made by indenture to one for the term of life, with this proviso, s. *It is provided by the indenture aforesaid, that if the lessee die within the term of sixty years then next ensuing, then his executors and assigns shall have and enjoy the land as in the title and right of the lessee for the term of so many years as amount to the number of sixty years to be reckoned from the date of the indenture.* And it was demurred in law, Whether by this clause the lessee has interest for the term conditionally, or, Whether his executors and assigns may have it as a lease, or not. And the Court thought this was not a lease, but only a covenant, &c. See 22. *Aff.* 19. [37.] and *East.* 6. *Eliz.* [5. *Eliz.* 222. a. *post.*] and *East.* 14. *Eliz.* fol. 309. b.

Lease for life by indenture, *proviso, that if the lessee should die within 60 years, his executors should have so many of the 60 years as should be behind at his death, this proviso is but a covenant and not a lease.*

1. *And.* 19. 3 C.
1. *Co.* 155. a. 2. *Co.* 72.
Dier. 181. 1. *R.* 1. *Ab.*
518. 848. *Hob.* 35. 3.
Leon. 155. 2. *El.* 253. b.
Noy. 14. *Plow.* 520. b.
Mo. 247. 480. 3. *Hult.*
163. *Yelv.* 9. 1. *Roll.*
Rep. 359.
[*Co. Lit.* 54. b. *Sheph.*
Touch. 125. 1. *Bac.*
Ab. 528.]

(83) *Sparke's Case*, [*Cro. Eliz.* 841.] The opinion of the Court was, that no lease for years was vested by this proviso, because nothing of the said term was given in fact to the lessee for life in his life-time as remainder to him and his executors for sixty years, *q. Bendl.* c. 68.

Panel against Nevel.

(84) **D**EBT on bond by Panel against Sir T. Nevel of

Holt in the county of *Leicester* conditioned for payment of fifty pounds at a certain day at *Holt* in the mansion of Sir T. and he pleaded that at the day he was there ready to pay the sum, and no one on the part of the plaintiff came to receive it, &c, without saying *uncore priß*, with a tender of the money in court, or saying *uncore priß* to pay at *Holt*. And to this plea there was a demurrer in law. And by the opinion of the Court without argument it was adjudged no plea; otherwise would it have been if the condition had been to do any other collateral act, and not to pay money, which is the nature of the sum of the penalty, and the very duty by in-

Plea of tender at A. to a bond for payment of money there, without *uncore priß* and bringing the money into court, or without *uncore priß* to pay at A. is bad. *Scus.* if it had been conditioned for the performance of any collateral act.

Pasch. 3. 4. *Ph. & M.*
Rot. 655.
[1. *And.* 4. A. *Bendl.*
37. & *Benl.* 54. 3 C.]
1. *Roll. Ab.* 448. 55.
Co. Lit. 207. a.

28.H.2. 25. a. 10.H.6. tendment of law, for the surety of which the obligation of
 16. b. 47. 49. E. 3. 26. the greater sum was made. See *accord.* 7. E. 4. [3. pl. 7.
 9. 11. 14. 22. 35. H. 6. 4. pl. 10.] But by CATLIN, and GRIFFIN *Attorney General*,
 27. 23. a. 39. 2. 19. 27. the law is not so, because the place of payment is parcel of
 H. 8. 12. a. 1. a. Perk. the condition, and it ought not to be paid, or done in any
 152. a. 11. H. 4. 62. a. other place, &c. And so there is a diversity in 7. H. 4.
 20. E. 4. 1. b. 21. E. 4. [18. a. pl. 17.] where the place of payment is appointed, and
 42. 16. H. 7. 7. a. 13. where not, &c. But see *East.* 11. H. 6. [26. b. pl. 6.] *à contra.*
 41. E. 3. Dam. 75. 2. Rol. Ab. 523. (A). 1. Ld. Raym. 254. 1. Str. 638. 2. Rol. Ab. 524 D.
 Dier, 300. B.N.C. 154. [Ante, 25. a. note (a).
 B. Tout temps profit, 41. 5. Bac. Ab. 11. 18, 19.]
 Perk. 15.

Eaton College Case.

Lease by the provost and royal college of the college of the blessed Mary of Eaton &c. by the name of the provost and fellows of the royal college of Eaton, &c. is void.

[Benl 45. Jenk. 214.] 1. And. 23. } S. C.
 Mo. 13.

10. Co. 124. 2. See Plow. 536. 1. Leon. 159. 35. H. 6. 5. b. 3. Co. 76. a. 38. E. 3. 28. a. 20. 21. E. 34. 12. a. 56. a. 14. H. 7. 1. 15. E. 4. 15.

(85) THE corporation of the college of *Eaton* was erected by king H. 6. by the name *præpositi et collegii regalis collegii beatae Mariae de Eaton juxta Windfor*. And in the time of E. 6. Sir Thomas Smith, knight, being provost there, a lease was made by the name *præpositi et sociorum collegii regalis de Eaton, &c.* omitting *collegii beatae Mariae*. And by the opinion of all the Judges it was a void lease; and it was so adjudged, see M. 10. & 11. *Eliz.* fol. [278. a. pl. 1. *post.*] and M. 18. *Eliz.* fol. . the place of the corporation, s. *Chester* was omitted in the grant of the endowment made to the dean and chapter, but inserted in the *habendum*.

[6. Vin. Ab. Tit. Corporations, (G. 4) 1. Bac. Ab. Tit. Corporations, (C. 2.) Shep. Touch. 233. Cowp. 29. 4. Term Rep. 425. 2. Hen. Bl. 113, 114.]

* [150. b.]

A devise of an entire manor holden by knight-service made in fine between the statute of

* Hyde against Umpton.

(86) IN a writ of partition between *Hyde* and *Umpton* the case was: That *T. Umpton* by his last will in writing made in the interim between the statutes 32. H. 8. [c. 1.]

(86) 3. & 4. P. & M. Rot. 1131. Bendloe's Rep. [49. pl. 83.] adjudged accordingly, 1st, In regard that the statute 32. H. 8. [c. 1.] says, a man shall make his will of two parts of the lands in three parts to be divided, which words in three parts to be divided found in the future tense, and the said statute is not intended that the two parts should be divided in the life-time of the testator before the devise made: and also in the said statute there is another sentence following (or else as much of his lands), which sentence, although it follows it, is a new sentence after it, and not part of the first sentence. And also the statute says, the value shall be divided after the death of the deviser by commission, whereby it appears that the meaning of 32. H. 8. c. 1. was not that the will shall be void if the division was not made in the life-time of the deviser. Also the statute 34. H. 8. explains the intention of the makers of the former to be so. A like judgment was given upon the last will of Sir Peter Philpot, also named in the proviso of the statute 34. & 35. H. 8. See M. 14. & 15. *Eliz.* Rot. 1402.

and 34. & 35. [H. 8. c. 5.] concerning the dispositions of lands, &c. devised a manor entire holden by knight-service in fee; and by a special proviso in the statute of Explanations [§. 8.] this case is excepted and referred to the exposition of the law, Whether it be a good will for two parts, or void for all. And by the opinion of the Court this Term, without argument, it is good for two parts, and void for the third (a). And so adjudged against KEILWAY's opinion. And in a writ of error brought in B. R. the opinions of three Judges, J. CATLIN, C. J. RASTEL, and CORBET were accordant, and WHYDDON only *à contra*, about the 2d of queen Eliz. But for other causes the judgment was reversed.

wills and the statute of explanations is good for two parts, and bad for the third.

M. 3. & 4. P. & M. Rot? 1131.
See Brooke Tit. Testament, 26.
Bendloe, 49. } S. C.
Jenk. Cent. 5.
c. 57. 1. And. 3.
3. Co. 33. b. 8. 85. a.
Raft. Wills. fol. 538. a.
Plowd. 68. b. 563. B.
N. C. 486. 1. Leon. 76.
3. Leon, 29. Finch. 7. a.

(a) 12. Car. 2. c. 24. having altered the tenures to common socage, all lands in fee are now devisable.

Michaelmas Term,

4. and 5. Philip and Mary.

(1) **MEMORANDUM**, That the office of chief prothonotary in C. B. became vacant after last Term, by the death of *Nicholas Rockwood*. And LORD BROOKE, Chief Justice of C. B. gave that office to one *Gateare* his wife's brother: and because he was unfit, he revoked his gift, and gave it to *Whiteley*, against the will of the other Judges, who judged *Bilfore* more capable. And then a certain precedent was shewn, the tenor whereof follows in these words,

s. *Memorandum*, That *Thomas Croxton* (who held, exercised, and occupied the offices of coroner and attorney of our lord the king before the king himself *quamdiu se bene gereret* in the same by the grant of the king himself, by his letters patent, as by the inrolment of those letters in the court of our lord the king before the king himself remaining appears of record) on the last day of *June* last past died, whereby the said offices became vacant, and continued without any officer.

Of the offices of chief prothonotary in C. B. and coroner and attorney of B. R. and that the grant of them to unskilful persons is void.

Co. Lit. 3. b. 9. Co. 50. 96. Hob. 148. 15. Car. Cro. 557. 9. E. 4. 5.

VYNTER's Case.

[2. And. 118. S. C.]

[Godb. 391. Hard. 130. Post. 175. pl. 25. 4. Mod. 30.]

21. Co. 3.

Post. 153.

* [151. a.]

Pier, 149.

Co. Lit. 3. b.

officer. Whereupon on the morrow after the death of the said *Thomas* in the said court of our said lord the king, before the king himself at *Westminster*, came one *Thomas Vynter* in his own proper person, and shewed there in the said court the letters patent of the said lord the king to the said *Thomas Croxton* and *Thomas Vynter* of the said offices made, as he asserted; and prayed that he by the Court there to the offices aforesaid by virtue of the said letters might be admitted, &c. And thereupon the Justices of the said lord the king assigned to hold pleas * before the lord the king, (for that the said offices are of great weight and burden, touching as well the crown of the said lord the king as his interest and the kingdom, and require a discreet, learned, and expert person in the said offices, and for that it is impossible that any one can properly use and exercise these offices, unless he shall have been educated in the same from his youth, and hath had great and long experience therein, and it was never seen that any one was admitted in the said court to occupy the said offices, but such a one as was educated in them, or had continued long in other offices of the said court, and the said *Thomas Vynter* never was educated in those offices, or in any other office in the said court, as sufficiently appears to the said Justices, whereby the said *T. V.* is altogether unfit to have, occupy, and exercise the said offices, and the grant of the said offices which was made to the said *T. V.* and the said letters patent of the said lord the king made to the said *Thomas Croxton* and *T. Vynter* are void in law,) then and there refused to admit the said *T. V.* to the said offices for the good of the lord the king and his people. (2) And afterwards the said Justices of our said lord the king assigned &c. came into the presence of the said lord the king at *Westminster*, by command of the king himself, and being interrogated there by the said lord the king concerning the fitness and knowledge of the said *T. V.* for the occupying and exercising of the said offices, replied, that the said *T. V.* was unfit and inexperienced in knowledge and practice for the occupying of those offices for the good of the king and his people, because he never had any experience in the said offices, or in any other office of the said court, nor was in any degree learned, or educated in the said offices, or in either of them, nor ever had continued in any other office of the said court. (3) And being further interrogated by the said lord the king, who was fit and expert to occupy

and

and exercise the said offices to the good of the said lord the king and his people, they replied, that one *John West* had daily and continual experience and knowledge in those offices beyond any other, and had continued in the said offices for twenty-six years, and was expert and fit to occupy the said offices. Wherefore then the said king at *Westminster*, weighing the premises *ore tenus*, commanded *John Markham*, knight, *C. J.* of the said king, *William Yelverton*, knight, *Richard Bingham*, knight, and *William Lokener*, Justices of the said lord the king assigned to hold pleas before the king himself, then there present, that they should admit the said *J. West* to the said offices, and receive his oath that he would well and faithfully discharge the said offices, and institute and put the said *John* into the said offices; * by virtue of which order, the Justices on the 3d day of *July* then next following, in the court of our lord the king aforesaid before the king himself at *Westminster* aforesaid, admitted the said *John West* to exercise and occupy the said offices, and received his oath, and instituted and put him into the same, as in the said court of our lord the king more fully appears of record &c. And afterwards the said Justices of our lord the king of the bench being together in the exchequer chamber of our lord the king, the said Justices assigned to hold pleas before the king himself, informed the said Justices of the bench of all they had done in the premises, asking of them, how it appeared to them, whether they had done well and lawfully therein, or not; who said, that the said Justices assigned &c. had done well and lawfully in every thing. And afterwards the said king commanded by his letters patent under his seal directed to the Justices assigned &c. that they should admit no one to have or occupy the said offices save only the said *John West*, according to the form and effect of the said order of the said lord the king before given *ore tenus* to the said Justices assigned &c. wholly refusing the said *T. V.* praying to the contrary; and further commanding the said Justices, that the said letters under his seal should be enrolled in the rolls of his said court, as by the said letters of the said lord the king under his seal here in the said court enrolled, more fully appears of record.

9. E. 4. 5.

* [151. b.]

WORCESTER.

Upon an information grounded on indictments against an hereditary sheriff for voluntary escapes of felons, and holding his tourn in loco infuto, the office may be seized into the king's hands *quousque*, without *scire facias*, or other process.

8. H. 8. Cro. Keilw. 192. 194. [S. C. quod vide.]

2. Rol. Ab. 55. 2. Inst. 71. 9. Co. 50. a. 96 b. For misuser is forfeiture of an office without *scire facias* sued out if office be found. Dier, 128. b. 198. a. 111. a. 39. H. 6. 33. b.

[2. Hawk. 90. Bac. Ab. Offices (M.) and 4. Com. Dig. 304.]

Sir John Savage's Cafe.

- (4) **MEMORANDUM**, that *Sir John Savage*, knight, being sheriff of the said county for term of life, or in fee, was indicted for two escapes of felons, *felonice et voluntarie*, by two several indictments; and was also indicted for holding his tourn in an unaccustomed place against the form of the statute of *Magna Charta* [c. 35.]. And these three indictments were removed into *B. R.* where they remain. And the Attorney General put in an information there against him upon these indictments. And by the Court, the office of sheriff aforesaid was seized into the hands of the king *quousque* &c. and this without *scire facias*, or any process awarded against him, &c. *Mich. 8. H. 8. Rot. 21.*

Paschall against Keterich.

Account will lie for a legacy to be paid out of the produce of land, but it cannot be sued for in the ecclesiastical courts.

Jenk Cent. 5. c. 56. S. C. [Benl. 60. S. C.]

Hob. 269. N. B. 43.

44. 2. Rol. Ab. 285.

Palm. 120. 1. Bulstr.

153. Poph. 59. 2. H. 4.

22. 3. H. 6. 3.

* [152. a.]

Dier, 310. a. 9. E. 4. 47.

F. Executors, 37. 9. Jac.

Cro. 279. 1. Rol. Ab.

116. (A.) 11.

[3. Bac. Ab. 489. 3.

Salk. 223. 1. Sid. 46.

See also Cowp. 284. 1.

Hen. Black. 111. note.]

- (5) **NOTE**, By the opinion of all the Justices of each bench, where a man devised by his last will and testament in writing that his executors should sell his land, and that his daughter should have a portion of the money for her advancement, and so of other things a sum certain, and died, and his executors made sale, and would not pay the legacies, wherefore the daughter sued execution in the court christian, prohibition well lies in this case, because it is not a legacy testamentary, but out of land, by reason of the last * will, in the performance whereof the court christian had no concern; but the party may well have an action of account at common law. See the contrary opinion, *T. 9. Eliz. fol. [264. b. post.]*

(5) In the argument of this case *BENLOE* objects; How can the daughter who never bails the money to the executors have account? To which *LORD BROOKE* answered, "I command you to receive my rents, and deliver them to *LORD DYER*, he shall have account against you: yet he did not bail the money."

M. 36, 37. Eliz. Lord Ricb's case so adjudged [Poph. 58.]

M. 36, 37. Eliz. B. R. This book was affirmed by *COKE arguendo* to be the better law, and that he shall sue in the court of the king for the money, and so it was adjudged two or three times in the course of his practice by *COKE*. [See 2. Bulstr. 257.]

(6) **A** MAN was committed to the Fleet this Term upon a condemnation in debt in *C. B.* and he was condemned before in *B. R.* also in debt at the suit of the same person in another action of debt, for another debt. And a *babeas corpus cum causâ* was awarded out of *B. R.* to the warden of the Fleet: and he returned the cause upon the writ, and brought the body into *B. R.* and he being there prayed both condemnations. And the plaintiff confessed satisfaction of both debts in *B. R.* and holden good enough without confessing satisfaction in *C. B.* And this is the common course there by HEYWOOD, and the warden of the Fleet is discharged of any execution, and debt, as to the party plaintiff, because he was in ward of the Marshalsea in *B. R.* upon the return for the debt in *C. B.* And if the marshal enlarges him, and suffers him to escape, he is responsible to the party, *quod nota*. The like upon a condemnation in debt in *C. B.* against one who was condemned in debt in *London* before the sheriff, and brought into court by *corpus cum causâ-condemnationis illius*, and committed to the prison of the Fleet for both. *T. 9. H. 5. Rot. 132. Simile, H. 14. El. fol. [307. a. pl. 68.]* where a great contention arose between the courts of exchequer and *B. R.* in *Cloucher's* case.

A man condemned in debt in *C. B.* removed from the Fleet into *B. R.* where he had been condemned for another debt at the suit of the same plaintiff, satisfaction of both debts acknowledged in *B. R.* is good for both.

4. Car. Cro. 90, 91. 128.

8. Eliz. 245. b.

22. H. 6. 131
Dier, 275.

[Salk. 350. 2. H. H.
P. C. 145.]

29. E. 3. 13. Dier,
197. a. 297. a.

(7) **T**HIS clause in an indenture of lease for years, put in the indenture immediately after the reservation of the rent, *s.* "Provided alway, and it is covenanted and agreed between the said parties, and the said lessee covenanteth and granteth, that neither he, nor his executors, or assigns, shall not aliene nor grant over the term to any person or persons without license of the lessor, but to the wife, or one of the children of the lessee." The lessee died, and his executors granted the term to one of the sons of the lessee according to the proviso. *Quære* whether he may grant this over to a stranger without license. And BROOKE, BROWNE, and DYER thought that he could not; but by STAMFORD and CATLIN he may, because the restraint

If a lease be made, proviso that the lessee, his executors, and assigns, do not aliene without license to any except his wife or child, the wife or child may not aliene without license, without breach of the condition. [But] 4. Co. 120. B. [and Sheph. Touchst. 142. seem cont'.]

28. H. 8. 6. a. 27. H. 8. 7. a. 2. Co. 72. a.

3. Co. 816. 28. H. 8. 13. 35. H. 8. Bro. Condition, 155. Plow. 133. a. 100.

[151. a.]

Michaelmas Term, 4. and 5. Philip and Mary:

[Ante, 45. a. pl. 1. 65. b. pl. 8. 91. b. pl. 15. 3. Wilf. 380. Cro. Eliz. 60. a. Term Rep. 425. Shep. Touch. 119.]

of the clause was determined when the grant was to the son: but *quere* this: Also *quere* whether this be a condition, or only a covenant, for it was not agreed between the Judges.

East. 42. El. C. B. [Cro. Eliz. 757.] *Tbome Almer v. King* and his wife; the lessee devised it to his wife.

[Cro. Eliz. 757.] *Tbome Almer v. King* and his wife; the lessee devised it to his wife.

* [152. b.]

LINCOLN.

* Thymolby and Gray's Case.

A juror challenged by one defendant upon a joint *venire* against two, indicted for the same offence, may yet be sworn and stand against the other.

[Dalison, 25. pl. 11. 6. C.]

Benl. 7.

Mo. 13.

Co. Lit. 156. b.

22. 23. H. 6. 4. 21.

3. 4. 10. H. 4. 5. 4. 2.

4. 2. 8. E. 2. 46. b.

4. H. 4. 6. 2. 50. E. 3.

1. Crompton, 85. Fitz.

Challenge, 24. *Venire*

facias, 32.

(8) IN B. R. one *Thymolby* and one *Gray* were arraigned upon an indictment of robbery as principals; who severally pleaded not guilty, and severally put themselves upon the country last Term, whereupon a *venire facias* was awarded, which was returned this Term: and the jury appeared. And three of the jury were sworn against both: And *Tb.* challenged the four next without cause; or without saying, peremptory. And *G.* would not challenge them; wherefore *Thymolby* was taken from the bar. And the four who were challenged by *T.* were jurors against *G.* and others more, until twelve were charged upon him; who found him guilty. And it was moved by SAUNDERS, *Chief Justice*, Whether this be a proper trial or not, because there was only one *venire facias* awarded, and only one panel returned. And a juror cannot be drawn out of the panel, and also allowed in one and the same panel, because it is repugnant, by 9. E. 4. 29. [27. b. pl. 40.] in appeal: *quere* of this. But it seems by the opinion of the Justices of both benches that the trial was good, because no judgment was given that the jurors who were challenged by one should be drawn, but that they should stand aside for a time: and they were not clearly discharged by the Court. And it seems that *T.* may release his challenge again by the assent of the Attorney General afterwards. And also the *venire facias* for the king differs from the *venire facias* in appeal, for the last is, "*who are in no wise of kin either to the plaintiff or to the defendants, &c.*" but for the king it is not so, &c. And also in 1. H. 5. [10. b. pl. 1.] it is ruled by the opinion of the Court, that a juror upon an indictment may be challenged by one defendant, and stand against the other, &c. because they are several panels and inquests in law. And if one of them had appeared in this case, and the other defend-

Plow. 100.

[Post. 246. b. 9. St.

Trials, 12. 2. H. H.

P. C. 263. 268. and

a. Hawk. P. C. 573.

580.]

stant

dant had made default, yet the Court may proceed against him that appears, otherwise it is in appeals, as it is said; Dier, 130. wherefore, &c.

Hunt against Ellifdon and Another.

Affize in Midd'.

(9) **ROGER Hunt** brought affize against *Ellifdon* and *Allen* of his freehold in *Ratcliff*, and made plaint of the office of the registrar and scribe of the high court of Admiralty of *England*, and keeper of the registers, and said that the said court had been accustomed to be holden from time whereto memory runneth not, as well at *Ratcliff* aforesaid as elsewhere within the realm, by the admiral &c. And for a title to the freehold, and having an affize of the office aforesaid, he says that there is and for all the time aforesaid has been in the said court an office of registrar and scribe, &c. and that by the custom in the court aforesaid from time aforesaid used and approved of *quælibet hujusmodi persona quæ nominata et assignata fuit* to the aforesaid office, when it has been vacant by the * high admiral of *England* for the time being, *assumpsit in se* that office, and the exercise thereof, and hath had, holden, and enjoyed the same office with all its appurtenances, *ut liberum tenementum suum pro termino vitæ suæ*. And he further says, that on the 20th day of *August*, in the 28th year of *H. 8.* the said plaintiff was nominated and appointed to the said office, being then vacant by *W. F.* knight, then being high admiral of *England*, by virtue whereof the said plaintiff afterwards, s. on the said 20th day of *August* in the 28th year aforesaid, took upon him the said office and the exercise thereof, by virtue whereof he held and occupied the said office, and was thereof seised, &c. until by the said defendants at *Ratcliff* aforesaid disseised, and thereupon he prays the affize. And the defendants, as to the aforesaid title, pray that it may be proceeded thereof between them and the said plaintiff to the taking of the affize, &c.

(10) And the affize found the three first points clearly as above, and also that on the said 20th day of *August* in the year aforesaid, one *Richard Watkins* and the said *Roger Hunt* were nominated and appointed to the said office then vacant, by the said *W. F.* knight, then being high admiral of *England*, by his deed sealed with his seal, to have to them for the

The abstract of this case ante, fol. 149. a. pl. 81. and Benl. 50. S. C.

Co. Lit. 164, 5. 3. Co. 47. b. See 114. b. pl. 63. of Philazer. 2. Inst. 412. Godb. 48. 2. Brownl. 11, 12.

a. Leon. 114, 115. 3. Cro. 110.

* [153. a.]

Ante, 150. b.

Ante, 141. 149.

[Salk. 465. 21. Co. 3.]

Dier, 114. b. 276, 7.

2. Rol. Rep. 10.

Dier, 325. b. 156.

[Bul. Ni. Pr. 76. Cro. Eliz. 336. But here it seems he ought to make title. 1. Sid. 73. 3. Mod. 273.]

* [153. b.]

Dier, 132. 137. a.

[Booth Real Act. 213. 1. Reeve's Hist. of Eng. Law, 336.]

M. 38. and 39. *Eliz. B.R. Error by Flower v. Rigden*, where affize was brought against A. and three others, A. made default, and the affize was awarded against him by default; and it was found that the three others disseised the plaintiff, but that A. was not concerned in the disseisin; and holden by three Justices, *POPHAM* being absent, that it is a good verdict as to A. and judgment given thereupon.

and

and they inquire of all things which prove and maintain the matter of the disseisin. As the assize of rent-charge in 29. *Aff.* [157. pl. 6.] taken by default, the plaintiff made title to the rent by deed bearing date in a foreign county, and good; allowed, 7. *H.* 7. [9. a.] by *HUSSEY* and *KEBLE*; and also it shall be intended that the appointment and assumption were in the same county where &c. And all the other Judges agreed to this. (13) And as to the nomination and appointment found by the assize to be by deed, that is good enough, because the custom is not altered by this, but well affirmed, although by the custom it would have been good by parol, for a man may speak by his deed and writing as well as by his mouth; and therefore see 35. *H.* 6. [12. b. pl. 20.] in the case of the prescription in a writ of annuity, and 21. *H.* 7. [5. a.] of a covenant to find a chaplain according to a custom. And as to the *habendum* to them for the term of their lives, and the life of the longer &c. that does not alter the matter, because their interest is by the custom, and not by this limitation. So if a man assign dower to his wife dowerable by deed *habendum* for the term of her life rendering rent, this is void as to the *habendum* and *reddendum*, because she is in by her husband, of whose endowment &c.

(14) Also 15. *H.* 7. [14. a. pl. 5.] rent assigned by one coparcener by deed to the other coparceners for owelty of partition, they shall not be joint-tenants, but coparceners of this rent, &c. whereto all the other Justices agreed as to these exceptions. Also some thought that the survivorship shall well maintain the immediate and sole appointment and nomination to *Hunt*, as he has declared upon it, and divers cases prove it, as the waste in 46. *E.* 3. [17. a.] the formedon by him who is heir in tail to a remainder executed, &c. Also 16. *Lib. Aff.* [48. a. pl. 19.] of the voucher of a record traversed, and no failure thereof. Also the plea of outlawry in 7. *H.* 4. [1. b. pl. 6.] at the suit of *I. S.* when it was at the suit of *W. B.* and 35. *H.* 6. [2. pl. 2.] of a recognizance alleged simply, and traverse of the record, and the recognizance certified with a condition, &c. (15) But

9. E. 4. 49. b.

32. H. 6. 27.

4. Co. 29. Plow. 141.
17. E. 3. Avowry, 95.
1. Co. 58.

[16. Vin. Ab. 173.]

1. Inst. 169. b.

32. 33. 35. H. 6. 31. a.
38. b. 44. E. 3. 6. 14.
E. 4. 1. b. N. B. 209.
Dier, 235. a. Plow.
57. 149. F. Record,
28. Dier, 187, 8. 36.
H. 6. 4, 5, 6. 20. E. 3.
Annuity, 38.

(13) *E.* 38. *Eliz. C. B. & Sheldon v. Hodges. Per Cur'*. Composition by deed does not determine a prescription, if it agree with the prescription; and yet if *A. have* + *common* or such sort of thing by prescription, and take a grant thereof of the king by patent, or of another by deed, this determines the prescription by estoppel, 21. *H.* 7. 5. a. *B. N. C.* 206. [4. Com. Dig. 470.]

† Orig. *ad lost common, ac.*

F f

all

6. 8. 9. 18. E. 4. 8. 25.
1. and 11. 7. b. 18. Aff.
18.

[1. Show. 289. 11. Co.
3. 4. 3. Bag. Ab. 737.]

all the doubt of this case depends upon the prescription above, and upon the intendment and construction of these words * *quælibet hujusmodi persona &c.* And therefore in the consideration of the title there appears an office which is entire, and more conveniently may be filled and exercised by one person, for the registering and enrolment of acts may be better performed by one person than by two, or more; also one person may better have the custody of the register and acts. Also, there is one donor of the office, and one person taker, and this by a custom used and approved of, which implies that one person was sufficient for the exercise of this entire office. Then it is to be seen how this word *quælibet* shall be understood, and also the adjectives and accessories, *s. hujusmodi, quæ nominata, assignata, assumens in se*, to enjoy the estate of freehold in the entire office with all fees, profits, &c. And all these have relation to their substantive, *persona*. And *persona* is defined by Calepine from the opinion of the philosophers to be *naturæ rationalis individua substantia, et non in universalibus, sed in singularibus tantum persona dici potest, et de nullâ aliâ creaturâ dici potest quam de homine vel angela*: Then *quælibet* ought to be referred to its substantive, and shall be intended of many singulars in succession, and not conjointly, because it refers to the time past, and to the use and custom used and approved of, that is, one single person cannot have two names of baptism, nor can be designed at twice, but at once only, as *ecce homo, &c.* So the other adjectives, &c. And yet sometimes the word *quælibet* is universal; as Ausonius,

Quælibet hîc vanas tempore cogit opes.

Also the statute of *charta de forestâ*, c. 16. *Quilibet forestarius*. And the statute of Merton, c. 9. [10.] *Quilibet liber homo, &c.* And a custom ought to be expounded according as it has been used and strictly; wherefore, &c. And STAMFORD was of the same opinion: but BROWNE and BROOKE, Chief Justices, *à contra, s.* that *quilibet* is collective and understood of many, &c. See *antea*, fol. [149. a. ph 81.]

5. H. 7. 41. 5. Co.
19.

M. 3. and 4. Ph. and M. Rot. 483. S. C. in Benloe [50. pl. 89.], who reports, that because the plaintiff could not prove the grant of the said office made to two persons, but only to one, his writ was abated.

Huggard against Knevit, Knight.

(16) **I**N a writ of entry in the *per* brought by *Huggard* against *Knevit*, knight, of the manor of *Bokengam*, &c. an effoign of *service le Roi* in parts beyond the sea was cast for *Knevit* on the octave of the Holy Trinity last past by *Anthony Knevit*. And he had day by effoign until the morrow of *Saint Martin*; and whether day to bring in the warranty for the effoign shall be given to the said effoigner or to the tenant himself was much debated. And also whether the warranty shall be to warrant the absence of the party on *Monday the morrow of the octave of the Holy Trinity*, because the octave was *Sunday*, and not a *dies juridicus*, * as the Register [fol. 19. a.] of the writ *de warr. diei* is, or generally of the octave of *Trinity*, was moved. And also concerning the form of the warranty; and whether it should be letters patent directed to the Justices of the bench, or a writ close. And whether it ought to recite the effoign, and that the effoigner was sworn because the effoigner ought to swear to the truth of the effoign, *quere*, for the precedents are rare: and note the tenor of the warranty of *service le Roi* in the writ of escheat, *M. 35. H. 6.* entered *Rot. 503.* and is in these words as follows: (17) “*To our justices of our common bench greeting, Inasmuch as Edmond Abbot of Westminster sueth an action hanging afore you against W. S. yeoman of our buttry, and in the process by the same abbot taken against him, he was effoigned being in our service at the quinsime of Easter last past, and I. Esthorp being effoigner supposed and sworn that he was so; We therefore certify unto you that the same W. was in our service afore the same quinsime, and at the same quinsime, and every time sithence. Given under our privy seal at Coventry the twelfth of October in the five and thirtieth year of our reign.*” And this warrant was holden and ruled insufficient; and by good advisement the following form was devised for *Knevit*, s. “*The king and queen to their Justices* Nat. Brev. 17.
of the bench greeting, Know ye, that T. Knevit, knight, was of the bench greeting, Know ye, that T. Knevit, knight, was in our service by our order in parts beyond sea on the octave of the Holy Trinity last past, so that at the said octave he could not appear to the plaint which is before you by our writ between O. Huggard, esq. demandant, and the said

Whether, in effoign *per service le roi*, the day to bring in the warranty shall be given to the effoigner, or to the party effoigned:

Whether the absence warranted shall be on *Monday the morrow of the octave of the Holy Trinity*, or on the octave generally, which is *Sunday*: and, Whether the warrant should be by writ close, or letters patent, and should recite the effoign, and that the effoigner was sworn or not, *qu.*

* [154. b.]

1. *Rot. Ab.* 827.
 7. *H. 4.* 5.
Nat. Brev. 17. *F.* 12.
H. 4. 16. 5. 6. *E. 4.*
79. 16. 19. 25. *H. 6.*
 51. a.

[2. *Inft.* 314. 555.
Booth. Real A.C. 15.
 10. *Vin. Ab.* 196.]

" *T. K. tenant of the manors of B. and C. with the appurtenances, at which said octave the said T. was effaigned of our service by A. B. and therefore we command you that the said T. be not put in default because of his absence at the said octave, nor be in anywise damnified. Witness ourselves*
Et c."

If land holden by knight-service be granted to one in tail, remainder to the king, the issue shall not be in ward to any body, for by the king's acceptance of the remainder the feignory is extinguished.

Co. Lit. 152. 2. Co. 92. b. 3. H. 6. 1. a. 2. Roll Ab. 514. 24. 48. E. 3. 6. 5. 9. 15. E. 4. 13. a. N.B. 142. b. Dier, 10. a. [Gouldsb. 149. pl. 73. But by 12. Car. 2. c. 24. wardship with all the feudal services is abolished.]

Between Our Lord and Lady the King and Queen and the Cardinal Archbishop of Canterbury.

(18) **L**AND was holden of the archbishoprick by knight-service; and in the time of Edward 3. this land was given by fine to one *Strangewaies* in tail, remainder in fee to the said king E. 3. The tenant in tail died, his issue within age: *quare*, Whether he shall be in ward to the Cardinal? And it seems not, by SAUNDERS and others, if the king will assent to that remainder, because the tenure and service above are gone and extinct by the fee-simple to the king, who can hold of none, and so the issue in tail shall be in ward to no one.

* [155. a.]

* Oldnoll's Case.

Slander spoken of the king is punishable under West. 1. c. 34. only, and not under 2. or 12. R. 2. which extend only to great men, nobles, &c. Indictment for such offence *contra formam diversorum statutorum*, and without saying *ubereby scandal might grow*, &c. is good.

Jenk. Cent. 5. c. 55. S.C. [2. Hawk. P. C. 349. 358.]

(19) **M**EMORANDUM, That one *Oldnoll*, yeoman of the guard, was indicted this Term for horrible and slanderous words spoken of the queen, declared and spoken more than three months past before the indictment, against the form of divers statutes, without mentioning any one in particular, and without mention of these words in it, *s. "whereby scandal might grow in the kingdom between the lady the queen and the great men or her people, &c."* and being arraigned thereon was convicted: and what judgment he should have, *s. whether he should be imprisoned and kept in prison until he should find in court him by whom the words were [first] moved according to the statute of West. 1. [3. E. 1.] c. 34. or according to the statute 12. R. 2. c. 11.*

(19) *Eaft. 3. H. 4. Rot. 12. B. R. Westminster, John Sparbam, of Cardiff in Wales, was adjudged to be hanged, drawn, and quartered, for scandalous words spoken against the king; together with Trin. 3. H. 4. Rot. 4. Nich. Lowib, for false and dishonourable words against the king.*

that

that is to say, that he should be punished by the advice of the council, notwithstanding the statute aforesaid and the statute 2. R. 2. [ft. 1.] c. 5. was much doubted and debated; for the punishment of the statute 1. & 2. P. & M. [c. 3.] he cannot have, because the time is past, &c. But at length, after great consultation and comparing of the said statutes, s. *West.* 1. and R. 2. it was agreed by the Judges and SERJEANT BROWNE that he should undergo imprisonment, and be fined at the king's pleasure, till he hath found his surety, &c. according to *West.* 1. and not according to the judgment or advice of the council, &c. for that is when the slander touches the nobles and great officers expressed in the statutes 2. and 12. R. 2. and extends lower to the commons and people, and not to the † king, for he is an excepted person, and not implied in these words, " the high or great " men or nobles, &c."; wherefore, &c.

4. Co. 12.

Co. Magn. Chart. 228.
12. Co. 133.

2. Co. 46. b.

[2. Inst. 225. Crompt.
Jurid. 19. 35.]

† With the civilians the king is reckoned among the nobles. Dr. Ridley, fo. 93. .

Tyrrel's Case. In Cur' Ward'.

(20) *JANE TYRREL*, widow, for the sum of four hundred pounds paid by *G. Tyrrel* her son and heir apparent, by indenture enrolled in chancery in the 4th year of E. 6. bargained, sold, gave, granted, covenanted, and concluded to the said *G. Tyrrel* all her manors, lands, tenements, &c. to have and to hold the said &c. to the said *G. T.* and his heirs for ever, to the use of the said *Jane* during her life, without impeachment of waste; and immediately after her decease to the use of the said *G. T.* and the heirs of his body lawfully begotten; and in default of such issue, to the use of the heirs of the said *Jane* for ever. *Quære* well whether the limitation of those uses upon the *habendum* are not void and impertinent, because an use cannot be springing, drawn, or reserved out of an use, as appears *prima facie*? And here it ought to be first an use transferred to the vendee before that any freehold or inheritance in the land can be vested in him by the inrollment, &c. And this case has been doubted in the Common * Pleas before now: *ideo quære legem*. But all the Judges of C. B. and SAUNDERS, Chief Justice, thought that the limitation of uses above is void, &c. for

Bargain and sale for a valuable consideration to *A. habendum* to the use of bargainor for life, remainder to the use of *A.* in tail, remainder to the right heirs of the bargainor, the *habendum* is void, and *A.* shall have the land in fee.

[Benl. 61.] } S. C.
1. And. 37.
A. Bendl. 28. }

Uses void by 27. H. 8.
Dier, 114. 8. 146. 312.

B. N. C. 60. 284.

7. El. 235. a. 1. Co.
137.

[155. b.]

Crompton's Courts,
53. a. 54. a.

Raft. Inrolments, 2. Suppose the statute of Inrollments [cap. 16.] had never been made, but only the statute of Uses, [cap. 10.] in 27. H. 8. then the case above could not be, because an use cannot be ingendered of an use, &c. See M. 10. & 11. Eliz. 4 fol.

Clarves' Case.

A devise of lands devisable by custom, holden in capite by knight-service, is good against the heir for the whole. *Quæ* as to the king's wardship and primer seisin (a).

Dal. in Keilway, 205. b. pl. 9.

[See Hargrave's note (4) to] Co. Lit. 111. b. 3. Co. 35. a. 9. 133. b. Mo. Rep. fol. 54. a. that he may. Dier, 229.

Dier, 56. a. 50. a.

20. EL. Bendlofe, 29. Mo. 70.

(21) **TENEMENTS** devisable in London came to the hands of king Henry 8. by the dissolution of the abbeys, and afterwards the king granted them by patent in fee to hold in chief by knight-service. *Quære* Whether the patentee may devise the whole by his testament or last will in writing, or only two parts? And it seems, that if his heir be within age the king shall have the third part in ward by reason of the saving in the act of 22. [32. H. 8. c. 1.]; but if he be of full age, *quære* Whether he shall have the primer seisin of the third part against the devisee by reason of the said saving? But it seems that the heir after his full age shall be bound for the whole: for there are no words expressed in the statute to restrain the will of lands which were devisable by will before the act. *Quære bene*. And this question was put by the Attorney General T. 4. & 5. P. & M. to the Board of *Serjeants Inn*, and again in the court of wards *Easter*, 5. Eliz. for Charles Clarves; and it was holden clearly that the devise is good for the whole against the heir, but perhaps not against the queen for ward or primer seisin.

East. 6. Eliz. The 4 Skinners of London's Case, and 4 Clayton's Case, 16. Eliz. *East*. accord".

(a) But now 12. Car. 2. c. 24. which abolished all the consequences of feudal tenures and services, having turned all into

free and common socage, lands in fee are all devisable, with the solemnities required by 29. Car. 2. c. 3.

Upon an office stating *de quo vel quibus tenementa tenentur, vel per quæ servitia juratorum igitur*

(22) **I**N the court of wards it was moved as a great doubt, Whether the writ of *melius inquirendum* be grantable upon an office which has the words "of what person or per-

(22) Note, That the ancient course of the exchequer was, if it was found by office that A. B. was seised of tenements but of what person or persons they are ignorant, that a commission should issue to enquire certainly &c. and if it was found that it was of J. S. then the party had an *ouster le main*. But if the office found tenure of the king, but by what services &c. *ignorant*, this is good for the king, and the best shall be intended for him, *s. in capite*. But now in these cases a *melius inquirendum* shall be awarded by the statute aforesaid. See 1. Instit. 77. b.

"*sous the tenements are holden the jurors are wholly ignorant, or by what services the jurors are ignorant*" by the common law, although it be recited in the statute 2. E. 6. c. 8. that the ancient common law was so; for several were of opinion that by the common law such office was sufficient to give title to the king, and by the Register [293. a.] the *melius inquirendum* is awardable in these two cases, s. where the jury find that the tenements are holden of the heir of J. S. without shewing the name of the heir; and where they find the heir to him who dies on the mother's side, but who is heir on the father's side they are ignorant; in which case who is the next heir is not found: and also where the tenure of what person or persons is not found; and also where the value was too small, &c. But as it seems by reason of the said statute, which has [§ 12.] a proviso that saves offices and inquisitions, titles, and the interest of the king and every person * accrued before the 20. day of *March* then next &c. as if the act had not been; therefore by the better opinion no *melius inquirendum* shall be awarded at this day upon any such ancient office found and returned before the statute, but the party shall be put to his traverse. (23) But SAUNDERS, C. J. *è contra*; and that there was a precedent to the contrary in the time of *Lord Portman*.

There was also another question in the court of wards: If the heir be found by office of the age of fifteen years, and when he comes to the age of twenty years he is found by *estate probandâ* of full age, which is false in fact, in this case the king has no remedy; but he ought to make livery to the subject *de jure* by SAUNDERS, DYER, and the King's Sergeants, but KEILWAY and the Master of the Wards *è contra*. See stat. 2. E. 6. c. 8. which gives a traverse to the heir at his full age in fact, although he be under by the office. And afterwards BROOKE, C. J. of the Bench, STAMFORD, BAKER, and divers others thought, that weighing the words of the statute [§ 4. & 5.], s. "at his very full age indeed," he shall have the *estate probandâ*: and if it be granted before, a traverse by the statute shall be admitted; and it was so ruled at length, as I believe. See *Trin. 2. H. 7.* [12. b. pl. 14.] Traverse in the case of *Higford* concerning the case above *De melius inquirendâ*, where the office was found as the report is, the said manor of *E.* in the county of *Warwick* was holden as of the honour of *Winton*, but by

rant, found before 2. Edw. 6. c. 8. a *melius inquirendum* shall not issue, but the party is put to his traverse.

Dier, 161, 162. 292. 8. Co. 168. 4. H. 7. 16.

2. Inst. 692. B. N. C. 141. Dier, 396. Fitz. 255. 11. H. 8. Cro. 199.

* [156. a.]

If the heir be found by office fifteen years old, and when he is twenty is falsely found by an *estate probandâ* of full age, the king is without remedy. Where it is found that he is of fewer years than in truth he is, he may traverse it; or when he comes to his very full age, may have an *estate probandâ* by the statute.

the service of the sixth part of a knight's fee, where by a search of the record thereof in chancery (which see in the following year [17. b. pl. 3.] a writ *de melius inquirend* issued out of chancery on account of the incertainty of the inquisition, because it was not found of what person or persons that tenure was, nor who was the lord of the honour of *Winton*; therefore &c.

Greswold's Case.

Gift to *A.* for life, remainder to the right heirs male of the body of the donor, remainder to his right heirs for ever; the donor dies, leaving issue two sons; *A.* dies, and the eldest son enters and dies also; leaving issue a daughter; she shall have the land, and not the uncle.

[Benl. 47. S. C.]
3. And. 3. S. C.

Co. Lit. 22. b. 26. b. 23. b.
Hob. 30. 1. H. 5. 8. b.
Bendl. c. 12. 2. Roj.
Ab. 415. 2. Leon. 25.
Bendl. 31. 1. Co. 102.
B. N. C. 302. 3. Kehl.
240. 705.

17. E. Tayle, 23. 2.
E. 3. 21. 4. E. 3. 125.
Lit. fol. 6. 12. H. 8. 2.

* [156. b.]

Fitz. 6. b. 82. 2. Co.
21. b. 8. El. 247. b.
Plow. 6. b.

(24.) ONE Richard Greswold, seised of land in fee, gave it by deed indented to one *A.* for the term of his life, remainder thereof to the right heirs male of the body of the said Richard the donor, lawfully begotten, remainder thereof to the right heirs of Richard for ever. And afterwards the donor had issue two sons, and died; and then *A.* the donee for life died, the eldest son entered, and had issue a daughter, and died without issue male; Whether the daughter or the brother should have the land was demurred in law, in trespass; and the case was well argued at the bar by all the serjeants. And two points are to be considered, s. Whether this limitation of the tail be good, or not? and then admitting it to be so, when the tail once began and vested in possession in the eldest son, when he died without issue male, Whether the tail be spent, or shall revert back to the younger son? as the case of one *Roberge* was in 1. 2. & 4. E. 3. [2. E. 3. 1. pl. 1.—2. & 4. E. 3. 50. b. pl. 47.] And note for this *Littleton* in the chapter of Fee-tail [§. 30.], where * land is given to the son, and to the heirs of the body of his father (then dead) begotten, this is a good tail in him; but *quære* whether his younger brother (if he have one) shall inherit.

(25) Also in the chapter of Estates Conditional [§ 352-3], where the condition is, that the feoffee shall give the land to the feoffor and to his wife, and to the heirs of their two bodies begotten, who have issue and die; and the feoffee makes a gift to the eldest son, and the heirs of the bodies of his father and mother begotten; this is a good performance: but *quære* whether the younger son (if there be any) shall

(24) Trin. 2. & 3. Pb. & M. Rot. 20. E. Bendl. E. 3. & 4. Pb. & M. Rot. 651. Bendl. [49. pl. 87] Adjudged that the limitation over of the remainder to his right heirs male was void, inasmuch as the limitation in fee was also to his right heirs. adly, The estate is determined by the death of the eldest son without issue male, inasmuch as it was vested in him at first.

inherit.

inherit. And it seems to me he shall be inheritable by this special form of the gift, and that the donor in his formedon in the *reverter* ought to suppose that after the death of the eldest son who was the donee, and one *I.* his son (if he had one) it ought to revert to him, inasmuch as the husband and wife died without heir of their bodies from them issuing, and not the first donee. And of this opinion also was SAUNDERS, C. J. But BROWNE and BROOKE *à contra* in this point, and also CATLYNE and SERJEANT BROWNE, but STAMFORD *à contra*. But it seems that the limitation of this remainder in tail is void, because the donor cannot make his own right heir a purchaser without parting with the fee-simple out of his person; and for this see 4. H. 6. [19. pl. 6.] in *Champernon's* case. Therefore for one cause or the other the Judges were against the tail, and with the heir general, and it was so adjudged.

1. Rol. Ab. 841. 827.

Dier, 90.

[2. Mod. 211. Co. Lit. 299. b. Mr. Butler's note (1).]

B. N. C. 187. 42. Aff. 2. 1. H. 5. 8. b. Dier, 9. a. 69. 163. 4. H. 6. 19. Gard. 50. Bro. Done & Remainder, 15. 14. H. 4. 32. a. 41. E. 3. 24. b. 43. E. 3. 12. b. 14. El. 309. b. 7. El. 237. b. 3. El. 199. a. 2. Co. 7. 91. Bro. Estates, 23. 66.

[4. Bac. Ab. 298. 1. Black. Rep. 22.]

Lucas against the Bishop of Ely.

(26) MEMORANDUM, That in this Term I inspected a certain record of *Hilary Term* 16. *Hen. 8.* Rot. 135. whereby it appears, that *Lucas* who was Solicitor General in the time of *Henry 7.* brought a writ of annuity in the county of *Cambridge* against the bishop of *Ely*, and counted upon the grant of his predecessor bearing date 21 *August* 20. *H. 6.* and made at *Ely*, of the office of steward of all courts and leets of all manors and lordships of the bishop within the counties of *Cambridge* and *Huntingdon* out of the ille of *Ely*, *habendum* for the term of the life of the said *Lucas*, receiving yearly for the said office of the said bishop and his successors during the life of the said *Lucas* forty shillings of and in his manor of *D.* in the said county of *Cambridge* at the Feast &c. And that afterwards one *R. Prior* &c. and the convent on the 23d day of *August* 21. *H. 7.* by his writing bearing date the same day in the 20th year aforesaid, and first delivered as their deed &c. on the said 23d day in the 21st year &c. ratified and confirmed &c. and shewed that he exercised the office and kept all the courts and leets of all and singular the manors by a certain sufficient deputy for five years according to the form and effect of the said writing;

Though the bishop of *Ely* be a party, his bailiff of the ille may claim cognizance.

In pleading his title by the steward of a manor, that he kept the courts is sufficient, without shewing any ingrossing of the rolls. And it seems he should shew a tender of his services to each succeeding lord, since it is issuable that such a successor did not exonerate him.

[5. Vin. Ab. 189.]

7. 9. Co. 10. 48. 18. H. 6. 1.

* [157. a.]

without

2. Inst. 233. b.

[2. Keb. 4. 26. 1. Sid.
283. Carth. 109. 1.
1d. Ray. 427. Salk.
183.]

6. 9. H. 7. 10, 11. 22.
Aff. 14. N. B. 26. a.

[5. Bur. 2820. 1. Black.
454. 2. Com.Dig. 609.]

7. Rol. Ab. 492. 8. 10.
35. H. 6. 20. b. 7. 54. a.
34. Aff. 14. 8. H. 6.
19. b. 2. 12. 21. E. 4.
19. 17. 47. 12. H. 4.
14. a.

9. H. 7. 11. a. 8. E. 3.
3. 1. Sid. 283.

18. E. 4. 9. a.

8. Co. 38.

*without shewing any engraving of the rolls; and that afterwards the bishop discharged him, s. exonerated and prohibited him from keeping any more courts, &c. although he was ready to have done it, if &c. And shewed further, that for divers years since the bishop had withdrawn the annuity, &c. (27) And the bishop came by his attorney, and made no defence, but one John Hind steward or bailiff of the said bishop of his liberty within the isle of Ely [came] and claimed cognizance of this plea to be holden before him at Ely, and averred that Ely was within the island aforesaid; and thereupon the plaintiff was demanded if he had or wished to say any thing wherefore the cognizance should not be granted, who said he had not. And because the said now bishop brought into court the letters of Edward 4. reciting, that in the time of H. 3. before SETON and Others, Justices in Eyre in the county of Cambridge in the 56th year of his reign, all writs sued out against the then bishop of Ely, and any of his men whatsoever, and others following their right within the isle of Ely, were delivered to W. W. steward &c. and this liberty allowed before them; and also this liberty was again allowed in the time of E. 3. as by the record thereof sent to the Justices here by the king's command fully appears; therefore the said bishop had his liberty in that plea; and note this without any words "although he himself be a party." And the steward appointed a day to the parties at Ely &c. And it was commanded to the said steward or bailiff that full and speedy justice should be rendered to the said parties there, otherwise that they should return &c. And see a similar matter by the said Lucas against the prior of Huntingdon brought in the county of Huntingdon, Trin. 20. H. 8. And he counted of divers priors that each of them exonerated and prohibited him from keeping the courts &c. and kept him so all his time, and shewed a tender of service to each new prior, and the issue was taken that such a certain prior did not exonerate, or prohibit, *priest* &c. and it was found for the prior &c.*

Hilary Term,

4. and 5. Philip and Mary.

Puttenham against Duncombe. In Cur.' Ward.'

* [157. b.]

(28) **P**UTTENHAM seised in fee of the manor of *Puttenham &c.* by indenture enrolled demised in fee farm to *Duncombe* and his heirs the said manor &c. rendering a certain rent with clause of distress, and re-entry for non-payment: and by the same indenture *Puttenham* covenanted and granted to * make such assurance &c. according to the true intent, purport, and meaning expressed in the same indenture. And by another indenture bearing date the same day, *P.* covenanted to levy a fine of the said manor &c. before such a Feast &c. by the name of the manor &c. which fine should be to the only use, intents, effects, and conditions expressed in the said former indenture, and to none other: and livery of seisin was made upon the indenture accordingly. And afterwards the fine was levied accordingly, s. as that which *Duncombe* had of the gift of *Puttenham*, and release &c. according to the course of fines &c. with warranty accordingly &c. Whether by this fine the rent and condition are clearly extinct and gone, was demurred, and well debated by divers &c. (29) And it seems that the rent is not touched by the fine of the land by reason of the former indenture, which shall rule the fine. And it is like a release made by the lord to the tenant of the land of all the right in the land and seigniorial *salvo sibi dominio suo, &c.* *E. 11. E. 3.* [*Fitz. tit. Release. 32.*] the tenure is not extinct, but the annual services only, and such right as he had to the land. And admit that there had been an express proviso that the fine should not extend to the rent or the extinguishment thereof, this had saved the rent. And in *6. R. 2.* [*Fitz. Estoppel, 211.*] in assise the case was, That a man enfeoffed two in fee, and then levied a fine to them *sur cognizance de droit come ceo &c.* and acknowledged the right to one as that which he and the other had of his gift, and released to them and to the heirs of one, according to the course of fines: yet this doth not change the estate by estoppel or otherwise, because it stands with &c. And so it was ruled upon good delib-

Grant of land in fee by indenture rendering rent, and re-entry for non-payment, the grantor covenanting by a second indenture to levy a fine *come ceo, &c.* to the only uses, &c. of the first; such fine being levied will not extinguish the rents or conditions.

1. And. 18. S. C.
3. Leon. 17. See 2. Co. 73 a. Rol. Contin. 246. Dier. 311. a. 3. Keb. 38. 537.

[Cro. Car. 321. Cro. Jac. 512. 5. Bur. 2787. See Skin. 186. & Cowp. 600, 601.]

3. Cro. 285. Mo. 106,

14. El. 311. b.

9. E. 3. Release 37.

40. E. 3. 22. a. 12. E. 4. 11. a. 2. E. 2. Voucher, 108. 5. E. 3. 12.

7. E. 3. 68, 69. 8. H. 4. 12. a. 2. H. 5. 7. a. 1. H. 6. 42. 5. Co. 26. a. 15. E. 4. 28. b. 3. H. 6. 42. a. 1. H. 5. 9. a. 8. Aff. 33. 22. Aff. 54.

ration.

ration. And if the rent above be extinct, then it seems a novel rent by the use shall be set up and raised immediately, &c. *sed quære inde.*

If the conusee of a fine refuse to take it according to the uses expressed in the indenture, the fine shall be to the use of the conusor.

And if *Duncombe* refuse to take the fine to the uses comprised in the indenture, then the fine shall be only to the use of *Puttenham* &c. (30) And it seems that *D.* is concluded by the indenture from taking the fine to any other use than the indenture purports, &c. And of that opinion on *Puttenham's* side were all the Justices of each Bench; but *BAKER, CARELL, KELWAY, CATLYNE, WESTON*, and the Solicitor General, *à contra* vehemently. And in *Hilary 1. Eliz. T. Parre*, knight, then being Master of the Wards, the decree at large is entered in the Court of Wards for *Puttenham*.

General entry into the warranty shall not extinguish a rent which the vouchee hath out of the land.

[2. Co. 77]

Simile by the opinion of all the Judges of the Bench, *Trin. 23. Eliz.* upon evidence to a jury of *Essex* between *Tusser* plaintiff and Others defendants, notwithstanding a general entry into the warranty by *Bradburne* and his wife and the fee in the wife, upon a voucher in a writ of entry in the *post*, &c. and the issue was, Whether the recovery aforesaid was to the use and behoof of the said recoveror only, &c. or to the use also that a rent reserved to the husband and wife by fine before the recovery to *Tusser* by them levied should be assured to *Bradburne* * and his wife in fee, and not to be extinguished? Whereupon, on account of the opinion of the Court, *Tusser* was nonsuited.

* [158. a.]

Drew against Marrow.

On a writ of entry, plea a demise from *A.* of land in *H.* with the appurtenances, and issue on *non demisit modo et formâ*, the verdict found that *A.* and six others to the use of *A.* were seised in fee of the said lands, and one messuage with the appurtenances in *H.* which lands and messuage were called *W.* and that the said *A.* and the others did demise the said messuage with the appurtenances called *W.* Whether, as

(31) ENTRY in the *quibus* of seventy acres of land, five acres of meadow, and five acres of pasture, with the appurtenances in *Halberton*. The tenant pleaded a demise for life made by one *John Crosse* as seised of the fee-simple in demise. The demandant intitled himself from the said *Crosse*, and traversed, *without this* that he demised in manner and form, &c. whereupon they were at issue. And the *posse* was, "that the jurors being called some of them came, and some of them did not come, as appears in the panel; and some of the said jurors then appearing, viz. *A. B. C. D. E. F. G. H. and I.* were sworn upon that jury, and because of one of the jurors then appearing, s.

"*Humphrey*

"*Humbrey Walrond, esq. being sworn upon another jury, and because the remaining jurors of the said jury did not appear, therefore others of the by-standers, &c. were added, &c.*" So that three of the by-standers were sworn, and found a special verdict, s. that the said *Crosse* and six others were seised of the tenements in demand, and of one messuage with the appurtenances in *Halberton*, which said messuage and tenement are, and from time whereto the memory of man runneth not, were known and called by the name of *West Selaocke*, in their demesne as of fee, to the use of the said *Crosse* and his heirs for ever; and being so seised, the said *Crosse* and the others at the request of the said *Crosse*, on the 12th day of *October*, 16. H. 8. demised by writing indented the said messuage with its appurtenances called *West Selaocke*, within the parish of *Halberton* aforesaid; and they prayed the direction of the Justices, whether the said *Crosse* demised the tenements demanded to the said tenant as he hath above alleged; and if it was no demise, they assessed the damages and costs, &c. And whether upon this special verdict the plaintiff shall have judgment or not, was moved by **PRI-DEAUX**. And first, Whether the verdict be not erroneous, because *Humbrey Walrond*, whose appearance is recorded, and not discharged by any challenge or other reasonable excuse by the statute *de Circumstantibus* [35.H.8. c. 6.], was omitted, and not one of the jurors. Also whether this demise by *cestuy que use* and his feoffees together be matter sufficient to maintain the issue for the tenant, or not. Also whether the demise extends to the tenements in demand, by the name of one messuage, with the appurtenances called *West Selaocke*, when it is not expressly found that the land in demand was appurtenant to the messuage, &c. Also whether the issue for the seventh part of the land be not sufficiently found for the tenant.

not expressly found that the lands in demand were appurtenant to the messuage, the demise found includes them? and

Whether being joint, it be a good demise by *A.* if not, whether good for a 7th part?

Where one juror appeared, and his appearance was recorded, and he not being discharged by challenge, or other reasonable excuse, was sworn of another jury, whether a talesman may be added to supply his place and make up the number of the first jury, *qu.*

Co. Lit. 281, 2.

35. H. 8. Co. 6. Jurors, 17.

[Bul. Ni. Pr. 300, 301.]

Plowd. 59.

14. E. 4. 1. b.

Bendl. 18.

2. H. 7. 32. a. 25.

Plow. 105.

35. H. 6. 38. b.

Dier, 153.

B. N. C. 37.

[See Plow. 168. 85.

Shep. Touch. 90, 91.

1. Eq. Ab. 209. 1. P.

Wms. 603. 2. Bl. Rep.

1148. 3. Will. 1414

2. Term Rep. 498.]

* White's Case.

* [158. b.]

(32) **ONE** *White* brought trespass on the case against an innkeeper of *Uxbridge*, alleging the custom of the realm to keep safely the goods of his guests, &c. and that

Evidence of refusal by an innkeeper to admit, on account of his house being full, and plaintiff's insisting to make shift his among other guests, will

(32) *John Barnbolby, esq.* impleads *Stephen Wilkins* as an innkeeper [1. Roll. Ab. 2. D. pl. 4.], and *Stephen* says that he is not a common innkeeper, &c. but that the said *John* cause

support a plea that the plaintiff's goods were not stolen through the default of the defendant or his servants.

[A. Bend. 18. Benl. 65.] } S. C.

2. And. 29.

22. E. 3. 11. 22. H. 6.

38. b. 8. R. 2. Hof-

tel. 7. Plow. 9. b.

2. H. 4. 7. N. B. 94.

b. 1. Rol. Ab. fol. 3.

F. 1. fol. 4. G. 1. 8.

Co. 33. a. 3. Keb. 73.

22. H. 6. 22. a. 10.

El. 266. b. 11. H. 4.

45. a. 98. 5. E. 4. 2. b.

39. H. 6. 19. a. 14. H.

7. 22. b. 22. Aff. 17.

Cro. 50.

[Bul. Ni. Pr. 73. 1.

Salk. 18. 1. Hawk. P. C.

452.]

came to his house, and said that he as the esquire of our lord the king was assigned (167) to lodge *per hospitorem domini regis*, and would there lodge; and Stephen said he would not answer for his goods, nor undertake the care of them, but if he chose to abide there, he should keep them at his own peril, and delivered his house to him; and the said Stephen was adjudged without day, and that John should take nothing by his writ. E. 3. H. 4. B. R. at Westm. Rot. 28.

The master may have an action if his servant travel, and his goods be stolen, and the judgment against the defendant is *quod capiatur* (a). Trin. 7. Jac. B. R. Rot. 1535. [Cro. Jac. 224.] Biddle v. Morice. Fitz. N. B. 347. 8. [fol. 94. B.] Register, 154. [104.]

Trin. 1. Car. B. R. By DODDERIDGE, if by agreement (b) three lodge in one room in an inn together, the innkeeper is not answerable for their goods, if they are stolen.

If clothiers in Term come to a common inn in London, and stay for a week or more; if they are robbed they shall have their action. East. 2. Car. B. R.

Trin. 1. Car. Rot. 115. B. R. Drope and Thayre's case [Poph. 178.] A master brings an action on the case against an innkeeper for goods stolen of his servant out of the inn, and it well lies. If one say to the innkeeper that he will return at night, and he is robbed in his inn in the interim, an action lies. Sir William Sand's case [reported in Walbroke v. Griffith, Moor, 877. And in Drope and Thayre, supra. And see Noy, 126. Cro. Jac. 188.]

(a) The report of this case in Croke is the other way; judgment had been entered in *misericordia*, and it was there assigned for error that it should have been *quod capiatur*; but the judgment was affirmed in Cam. Seach. But by 16. and 17. Car. 2. c. 12.

no judgment shall be reversed for want of a *misericordia* or *capiatur*, or because one is entered instead of the other. And by 5. and 6. W. and M. c. 12. the *capias pro fine* is taken away. See 3. Black. Com. 398.

(b) Orig. *Si par assign' lodge trois rooms in an Inn ensemble*. The most likely construction is that above given, which is ex-

actly the doctrine laid down in 8. Rep. 33. a. and Cro. Eliz. 285.

Randal's Case. In the Court of Wards.

A man having jointured his wife from his socage land, and devised two parts of after-purchased lands holden in *copie*;

(33) A MAN seised in fee of land in socage tenure assured it to his wife in jointure in the 32d year of H. 8. and eight years afterwards, s. in the 2d year of Ed. 6. he purchased

purchases lands in fee of tenure *in capite* in chivalry, and of two parts thereof made his will and died, his heir within age. Whether the king shall have any of the socage land to supply the third part of the whole land that the testator had &c. *quars.* And all the counsellors of the court and the Judges thought not, unless any covin can be averred in the case, which cannot here, as it seems; and therefore note the words in the second article of the statute of Explanations, 4. and 5. E. 6. [34. and 35. H. 8. c. 5.] which are, “and having no lands bolden by knight service, &c.” See *supra*, 142. a.

3. Co. 30. b. 10. 83. b.
32. H. 8. c. 1. Rast.
Wills 2.
B. N. C. 142. 6. Co.
76. Dier, 366. b.

1. Inst. 78. a.

[Ante, 155. b. note
(a).]

Easter Term,

4. and 5. Philip and Mary.

Dyer's Case.

(34) **MEMORANDUM**, That on *Monday* before the commencement of full Term, s. on the essoign day of the quinsieme of *Easter*, on account of the absence of MORGAN, *Justice*, whose turn it was to keep the essoign in B. R. &c. I JAMES DYER was appointed one of the Justices to hold pleas before the king and queen by letters patent bearing date at *Greenwich* on the 23d day of the month of *April*, during the royal pleasure, and received the oath from the lord chancellor at his house near *Charing Cross*, as a justice of B. R. whereby I kept the essoign, &c. And afterwards it was moved * for a doubt, Whether the effect and force of my first letters patent of Justice of C. B. are not gone, and ceased by this new patent? And BROOKE, *Chief Justice*, of the bench, BROWNE, *Justice*, WHYDDON, A. BROWNE, CATLYNE, and myself, thought that it is; because the inferior authority is taken away and resumed by the superior; as if a benefice become void by the promotion of the incumbent to a bishoprick. (35) Also the authority

The acceptance by a justice of C. B. of letters patent creating him a Justice of B. R. vacates his former patent.

Jenk. Cent. 5. c. 53. S.C.
B.N.C. 498. Latch. 32.

Winch. 95. 98.

[12. H. 4. 37. 8.
27. H. 8. 15. 20. Aff.
and 1. Geo. 3. c. 23.]

4. Car. Cro. 128.

Jones, 192.

3. El. 197. b.

* [159. a.]

12. El. 289. b.

11. H. 4. 37. 8.

27. H. 8. 15. 20. Aff.

116. 233. 11. H. 4.

77. a. 6. El. 228. b.

Dr. & St. 126. 128.

20. E. 3. Br. 250. 9.

Co. 118. B. N. C.

116. 509. 569. 494. b.

Bro. Commission. 9. 14.

(35) KNEVIT was Chancellor and Chief Justice together in the time of E. 3. 5. Co. 8. a. [So was LORD HARDWICKE, Chf. Temp. Hard. 364. in notis, and LORD LOUGHBOROUGH lately. And NOEL was Chief Justice of Chester as well as a Judge of Westminster Hall. And see Cro. Car. 600. But where two offices are incompatible, acceptance of the second vacates the first. 2. Term Rep. 81. Dougl. 398. note (a). 2. Term Rep. 777.]

H. 7. 28. 41. 44. E. 3.
5. b. 25.
2. Rol. Ab. 360.

of *B. R.* drowns every other inferior authority: as if there be commissioners in *Eyre*, should the king's bench come into that county where the justices in *Eyre* are sitting, their power ceases. *Lib. Ass.* [27. *Ass.* 1.] And also it is improper that a man should reverse his own judgment, as he would do in this case by error in *B. R.* And the stile of *B. R.* is to hold pleas before the king himself, &c. and not before the Justices, as in other courts, where a man may have two several powers and authorities *simul et semel*, as justice of the peace, and Justice of oyer and terminer, for the whole stile is before the Justices &c. And so it has been seen that one has been Justice of *C. B.* and Chief Baron of the exchequer together, as BROOKE in the time of Henry 8. and HUMPHRY STARKIE, in the reign of H. 7. anno 1. [10. b. pl. 13.] But all these cases vary from the king's bench, &c. Also if both these patents and authorities shall stand together, then for the same reason SAUNDERS, now Chief Justice of England, who was a Justice of *C. B.* before, may exercise both, and have, claim, and enjoy both fees, &c. for clearly he has not surrendered his first patent; and then it is not determined, except by the determination of the law; wherefore, &c. But STAMFORD and BENLOWES *è contra*.

9. E. 3. 9.

A woman cannot avoid a lease made by her first husband and herself of her land, if upon her marrying again before any day of payment, her second husband accept the rent.

1. Rol. Ab. 475. 2.
Rol. Rep. 132. 8. Co.
100. b. 33. H. 6. 31.
2. 9. H. 7. 24. 2. 4.

(36) HUSBAND and wife make a lease by indenture for a term of years rendering rent, the lessee enters, the husband dies before the day of payment of the rent, and the wife before the day also took a second husband, who accepted the rent at the day, and then died: it was moved by BROWNE, whether the wife can oust the termor, or not. And I, STAMFORD, and BROWNE, thought not, because she might have avoided the term before the day at her will and

(36) *East.* 22. *El. Rot.* 1587. Holden *per Cur'*. that by taking a second husband she is concluded during the term.

43. *El. & Weststone and Wentworth.* Tenant for term of life, remainder in fee to a *feme covert*. Tenant for term of life levies a fine, the husband dies, the wife takes another husband, and the tenant dies: the five years pass, and the husband dies, the wife shall be barred, and is not remedied by stat. 32. H. 8. c. 28. and in this case a diversity was taken between a warranty and right to land; as to the warranty, the wife cannot be consuant to avoid it, and therefore does not submit her assent to her husband, and his laches shall not prejudice her: otherwise it is of right to land, which is manifest, and therefore the neglect of the second husband shall prejudice the wife. But notwithstanding this diversity, it was adjudged that the wife shall be bound in this case; and this diversity was cited by NOY, Attorney General, in the *Last* reading, 1632 [Ante, 72. b. pl. 3. in margin.]

pleasure,

pleasure, which in law she has resigned and assigned to him who is her second husband; as if she had said in her widowhood to the termor, that she was content to accept the rent if *I. S.* agreed thereto; wherefore, &c. But BROOKE *contra*; therefore *quære*.

Mar. 143. b. *Perk.*
76. 5. Co. 10. 26.
H. 8. 2. 10. E. 3. *Sci-*
re facias, 119. 32.
E. 3. *Dower*, 121. 3.
Bulst 272.
[1. *Bac. Ab.* 303. 3.
Bac. Ab. 308. *Cowp.*
202. 483. *Dougl.* 50.
Co. Lit. 215. a. 1.
Term Rep. 86.]

• *Bylota against Pointel.*

(37) ONE *Pointel* and one *Raynolds* at *Melcombe* in the county of *Dorset*, bought a ship and a boat laden with oranges and lemons of a denizen stranger named *Domingo Bylota*; and upon the said contract they impleaded the said *Domingo* in *Southwark* in the court of admiralty there, before *W. COOKE, Doctor of Laws*, deputy or lieutenant of the admiral. And for this cause he brought an action on the case in *London* and *Surrey* against *Pointel* only; and the writ was brought upon the statute 13. R. 2. [ft. 1. c. 5.] and 2. H. 4. [c. 11.] to answer as well to the lord the king and the lady the queen, as to the said *Domingo Bylota*, reciting the statutes, and in the conclusion of the recital it said, that by such prosecution in the court of admiralty he incurred the penalty of ten pounds to the lord the now king and the lady the now queen, and counted accordingly against *Pointel* only, with a *simul cum* the said *Raynolds* prosecuted and impleaded, to wit singly. To this writ and declaration the defendant demurred in law. And one point was, whether the action brought by the king and the party aggrieved together be good or not. And for this point see precedents accordingly, *H. 6. H. 6. Rot.* 303. and *M. 31. H. 6. Rot.* 315. [4. *Inst.* 138.] and in the first year of the now queen in *B. R.* by *SWANTON*, who sued as well for the queen as for himself against *Willett*, &c.

• [159. b.]

Whether an action will lie upon 2. H. 4. c. 11. against one only, for that he, together with one *A. B.* impleaded in the admiralty court &c.

Whether the declaration be good if the contract is not stated to be made within the body of the county, and not upon the high sea.

Whether in a *qui tam* action the declaration may be to answer to the king and the party with *his* &c.

H. 4. & 5. P. & M. Ro. 831.

Bendl 58. pl. 96. and 64. pl. 111. S. C.

A. Benl. 10.

Crompton Courts, 90.

7. Co. 2. 4. *Inst.* 141. 10. Co. 116.

Dier, 59. a. 367.

[3. *Lev.* 398. a. *Haw.* Pl. Cr. 379.]

(37) *Trin. 8. Car. B. R. George Butler v. the College of Physicians* [Sir W. Jon. 261. Cro. Car. 256.] to reverse a judgment given against him in C. B. The doubt was, Whether it should be to answer to the lord the king and *I. S.* or to answer to *I. S.* who sues as well for the lord the king as for himself. *HOLBURN* for the defendants said, that it ought to be to answer to *I. S.* who sues as well for the lord the king as for himself: and cited [Coke's] *New Entries*, 167. b. & *Sammon*, and 163. b. and that the book [Coke's] *New Entries*, 166. a. is the only precedent where it is "to answer to the lord the king, and the party." *Noy, Attorney General*, in affirmance of the judgment, and that it ought to be to answer to the lord the king and the president of the college, and that there is no other form, and that it is good, being an original writ. *Regist.* 189. 14. *H. 7. Rouncevall* [Rastell's] old book of *Entries*, 207. (b) 421. 145. a. 428. (a) attached &c. as well to the lord the king as to *I. S.* who sues as well for the lord the king &c. Judgment was affirmed *per Cur.* *Post.* 238. [a. pl. 35.]

[1. Bac. Ab. 38.]

Mo. 89a.

1. Rol. Ab. 517.

20. Co. 116.

[Cro. Car. 603.]

3. Bulst. 205.

[Raft. Entr. 24. a.]

(38) And note in all these precedents there were three statutes of the admiralty recited, *s.* the aforesaid two statutes, and the statute of 15. Ric. 2. c. 3. and in all the precedents the effect of the surmise of the libel in the admiralty court was touched upon, *s.* that the cause commenced upon the high sea, and within the jurisdiction of the admiralty, when in truth the fact (if any there were) was in such a place in the body of the county of *D.* and not upon the high sea.

In an action upon 2. H. 4. c. 11. plaintiff is entitled to double costs.

[Sayer on Costs, 228.]

5. E. 4. 7. a. Plow. 37.

19. 22. H. 6. 7. 57. a.

Also in the judgment, the costs of suit of the action on the case were doubled as well as the damages, note this. And the judgment of the first precedent was, that the plaintiff should recover his damages, &c. and that the said defendant had incurred the aforesaid penalty of ten pounds to the king by the statutes aforesaid, and *capiatur*. And the second was, that the lord the king recover against the defendant the penalty

(38) Hil. 6. H. 6. Rot. 303. [4. Inst. 138.] Action upon the statutes R. 2. and H. 4. by *Burton v. Bartholomew Pitt*, for a suit in the admiralty of trespass at *Bristol*, and not upon the high sea, and at length he recovered one thousand four hundred pounds, viz. double damages, and the king had ten pounds fine, and defendant *capiatur*.

M. 16. H. 8. Rot. 140. [4. Inst. 139.] *London, Gold v. Bowyer et al* upon the same statutes, because they arrested and attached his goods and chattels at *Billingsgate* in *London*, upon the water, within the liberty of the city of *London*, and defendant traversed.

Trin. 3. and 4. P. and M. *† Brian v. Browne*. Rot. 904. Prohibition to the suit of an obligee of three hundred pounds, there supposed forfeited within the admiralty jurisdiction, when the obligation was made in the city of *Lincoln*.

So *East*: 39. El. C. B. Rot. 110. *† Shirt and Floyd* shewed that they entered into an obligation to the lord admiral for two hundred pounds for their appearance at his court; that the obligation was made at *Beaumaris* in *Anglesey*, and the suit in the admiralty against them, and therefore, because it was not upon the high sea, a prohibition was awarded.

Hil. 32. Eliz. Rot. 133. *† Bene v. Wilcocks*. It was a contract in *Suffolk* for service in a ship upon the sea in a long voyage in parts beyond sea for nineteen pounds salary, and this was for the nineteen pounds by the servant, in the admiralty, and because the contract was made in *Suffolk* a prohibition was awarded.

M. 42. and 43. Eliz. 3210. *† Penrose* was impleaded in the admiralty by the earl of *Cambridge* for goods of the earl, and *Penrose* pleaded a contract by deed *† made* upon land, and a prohibition awarded.

H. 43. El. Rot. 1801. C. B. *† Sir John Gilbert* took a great prize upon the main ocean from a Spaniard enemy, who had no safe-conduct inrolled according to 20. H. 6. c. 1. and a prohibition was awarded to commissioners delegates, before whom being impleaded, he denied the allegation of the plaintiff. And the exposition of the statute belongs to the temporal court: therefore, &c.

H. 38. Eliz. Rot. 718. C. B. *† Summes v. Martham*, who was sued in the admiralty for goods in the possession of *I.* in *Dartmouth* in the county of *Devon*, which were allotted to him by award of the lord admiral on the high sea, who was arbitrator for them, for his part of the adventure of goods to be brought to land, and prohibition granted.

Trin. 43. Eliz. Rot. 659. C. B. *Vincent Browne, Esq.* by reason of his manor, prescribes for wreck of the sea of all royal fish cast on shore within the said manor, saving to the king and queen the head and tail of whales, &c. which was confirmed in [3.] Ed. 1. [4. 17. E. 1. c. 11.] and he seized a grampus of the length of eighteen yards, which was cast up on the land of the manor, and within the county, upon the sands above the mark called the lowest ebb of the sea. *† Afterwards* he was impleaded by the admiral, who pretended title to the fish as found within his jurisdiction, and upon the suggestion aforesaid and statute alleged a prohibition was awarded.

† Orig. *detinue et.*

† Orig. *de pife in fast trabe in plea.*

of ten pounds, &c. and the defendant *cepiatur*. (39) And note that the first precedent was, that the action was brought in *Brigol*, where the citation and attachment of the admiralty court which was holden in *Soutbwarke* were served upon the now plaintiff: so note the action lies as well in the one county as in the other. Also the last precedent was, that two were impleaded in the admiralty court, and they joined in the action upon the case: and in the precedent in *B. R.* it appeared that the suit and libel were against two, and one only brought the action without shewing the death of his companion, so note. And note, this last precedent was in the [first] year of the present queen for Lord *Riche*, between *Swanton* who sued as well for the queen as for himself &c. against *Willett*. * And the chief point of the case above was, Whether the action should be brought against *Pointel* alone, where he together with *Raynolds* impleaded and sued &c. And it depends upon this point, whether this vexatious suit by two be not several in itself, and in the election of the party, whether he will sue both together in one action, or have several suits against them; for it seems that this attempt against the prohibition of the statute was *malum quia prohibitum*, and a crime, and a contempt to the crown, and in this offence each of them is a principal, therefore *quare* well of this. (40) Also the last words in the statute, *s. "if he be attainted or convicted,"* were omitted in the writ, whereas they are in all the precedents aforesaid, and therefore *quare inde*: for some say they are superfluous words in the statute, because they are intended of common reason; see in *Champertry*, 20. *H. 6.* 33. [30. b. pl. 30. *Bro. Ab. tit. Champerty, pl. 1.*] for this &c. Also the manner of the suit and vexation in the admiralty court, *s.* by attachment or citation, is not expressed, nor that the contract was made within the body of the county, and not upon the high sea, as the precedents are. Also the act prohibits the admiral and his deputy &c. and this writ and declaration are before *W. Cooke* doctor of laws,

36. H. 6. 16. 7. Co. 2.

[4. Mod. 180. 1. Salk, 32.]

* [160. a.]

9. H. 6. 36. Cro. 114.
14. H. 6. 9. 2. H. 7. 16.[2. Hawk. P. C. 343;
Noy. 1. 1. Com. Dig.
12. 22.]1. Rol. Abr. 90.
1. Rol. Rep. 90.[Rail. Erit. 25. b. 24. 2.
5. Com. Dig. 229.]

(39) *East. 28. Eliz. Hendley v. Brode*, [1. Leon. 41.] *Hendley* in trespass counts that *Brode* together with *I.* and *G.* broke his close, and it was moved in arrest of judgment, that by his own shewing he had abated his writ; but by *Wray C. J. Shute*, and Others, *Hendley* had judgment; for the trespass is joint or several at the election of the plaintiff (a).
2. H. 7. 15. [16. pl. 2.]

(a) It appears by the report of this case | the Justices of C. B. and Barons of the Ex-
in *Leonard*, that upon judgment being given | chequer held it bad, but cured after verdict
for the plaintiff error was brought, and all | by the statute of jeofails.

[1. Rol. Rep. 203. 410.
2. Bulst. 205.]

10. H. 7. 28. 1. H. 4.
4. 48. b. 33. H. 6. 20.

After the arguments at
the bar the parties came
to an agreement. Bend-
lofe, 65. pl. 111.

lieutenant or president of the high court of admiralty &c.,
and this cannot be, for the court has no lieutenant deputy or
president, &c. any more than there can be a brother to an
hospital. *T. 16. E. 5. (a)* and 6. *H. 7. [7. a. pl. 2.]* an ap-
peal against an abbot and canon of the said monastery &c. is
bad, therefore *quære* well of this point; for it should be,
before the admiral or his deputy. Also damages of two
hundred pounds are supposed in the writ, which is not the
form, &c.

(a) This is evidently mis-printed, and no
such case is to be found either in *Trin. 16.*
Aff. (and 16. E. 3. is not reported,) *T. 16. E.*
4. or T. 16. E. 2. but in E. 2. fol. 493. there

is a case apparently *contrà*, wherein the mas-
ter of the hospital of *St. Leonard* and the
brethren (*freres*) the word in *Dyer* being
confreres, of the same hospital bring a writ, &c.

Water de Chirton's Case.

If one indebted to the
king for customs by
covin enfeoff his friend
of lands purchased with
the king's money, him-
self taking the profits;
it shall be seized into
the king's hands until
&c.

[See 13. Eliz. c. 4. §. 5.]
11. Co. 93. a. 3. Co. 12.
Dier, 225. a. 295. a.
See Godbolt 292, 293.
Plow. 321. a. 7. Co.
82. a. 50. Aff. 5. a.
Rol. Ab. 160. 156. 162.
[Cro. Eliz. 545.]

If a collector indebted
to the king aliene his
lands and goods, and die
without heir or execu-
tor, process shall issue
against the terre-tenants
and possessors of the
goods to account &c.

[Str. 978.]

* [160. b.]

5. El. 245. a.
Dier, 208. a.

(41) **M**EMORANDUM, That one *Water de Chir-
ton* who was indebted to the king in a large sum,
s. eighteen thousand pounds and upwards for customs &c. was
committed to the Fleet. And it was found by inquisition, that
he had purchased certain lands with the king's money, and by
covin caused the vendor to enfeoff his friends in fee to defraud
the king, and nevertheless took the issues and profits of the
lands to his own use; and those lands with the value of them
were returned into the exchequer, and there by judgment
were seized into the hands of the king *quousque* &c. in the
exchequer, *Trin. Term, 24. E. 3. Rot. 4.*

And in the same year in *Michaelmas Term*, Rot. 11. *ex
parte rememoratoris regis* it appears that one *Thomas Favel* a
collector of the fifteenth and tenth being seised of certain
land in fee simple, and having divers goods and chattels *die
intromissionis de collectione et levatione* of the fifteenth and
tenth aforesaid, in extremity of illness aliened his tenements
and his goods and chattels* to divers persons; and died
without heir or executor: and process was issued against the
terre-tenants and possessors of the goods and chattels to ac-
count for the collection aforesaid, and to answer and satisfy
the king thereof &c. and this by the advice of the Chan-
cellor of *England*, the Chief Justice of *England*, and the
other Judges of either bench.

(42) **B**ROWNE moved this case at the bar: A man made two his executors and died; and one of them proved the will, and the other refused before the ordinary, and he committed the administration only to the other, and he made his executors and died: and the executors brought debt against a debtor of the first testator: Whether the action lies or not. And it seemed to BROOKE, *Chief Justice*, that it did, inasmuch as although the refuser might at his pleasure have administered notwithstanding his refusal in the life-time of his companion who proved &c. yet after his death his election is gone, and the ordinary may sequester the goods of the first testator, or administer if he choose; for now in law the first testator died intestate &c. And yet in 21. E. 4. 28. [23. b. pl. 8.] by the opinion of the Court the action is not maintainable by the executors of the executors &c. Therefore *quære* well.

Where one of two executors refuses to act, and the acting one dies, his executors shall have an action for the debt of the first testator.

9. Co. 28. a. Plow. 184. b. Swinb. fol. 183. 329. a. 10. H. 7. 9. 10. Dier, 185. b. 9. Co. 37. a. contra, 1. Perk. 485. 49. E. 3. 17. a. 36. H. 6. 8. a. 3. H. 6. 7. a. 2. R. 3. 20. 42. 48. E. 3. 26. 14. 35. H. 6. 36. b. 7. El. 231. b.

[Swinb. 414. acc. Wentw. Off. Exec. 42. cont'. Salk. 307, 308. 311. 2. Bac. Ab. 405. cont'. See 3. Burr. 1463.]

9. Co. 37. *Hensloe's Case*, resolved that the survivor may have the action.

(43) **L**AND was leased to three by the premises of the indenture, *habendum* to one for life, remainder to another for life, remainder to the third for life, and this matter was found by verdict at large in trespass upon not guilty, or in a writ of partition, where the issue was upon the jointenancy; and by the opinion of the Court, they are not jointenants, but they shall take in succession &c. according to 8. E. 3. [59. b. pl. 16.] *Vide simile*, *East.* & 11. *Eliz.*

Lease to three, *habendum* to one for life, remainder to another for life, remainder to the third for life, they shall take in succession.

Plow. 153. a. (See) Dier, 126. b. Perk. 36. Dier, 361. 1. Rol. Ab. 65. B. N. C. 140. 2. Co. 55. 30. H. 8. Bro. Leases, 54. 10. E. 3. 59.

[and the cases cited in

a. 8. E. 3. 59. b. Feoffments and Feits, 73. Mo. 26. 880. See Plow. 160. note (c) there. 3. Com. Dig. 333. Co. Lit. 183. b. Shep. Touch. 108. 1. Wood's Conv. 173, 174.]

In the Star Chamber.

(44) **I**T was moved for the almoner, s. for the chattels of felons *de se*, that one who was indebted to another in forty pounds to be paid by equal portions at two days, was bound with two others to the debtee, and for the discharge of

One being bound with sureties in 40l. payable at two days, sold them 20 oxen for 40l. by indenture, to be void if he indemnified them from

(44) If a man bail goods in pledge, and afterwards be outlawed, the king shall not have the goods before the party is satisfied. The law is the same if goods be leased for years. Fitz. Debt, 17.

the penalty, he to continue in possession at the will of the sureties; and nothing being paid on the first day, and the vendor committing suicide before the second day, the beasts or the money are forfeited to the king, but the sureties must be discharged against the debtor,

[* 161. a.]

Positidie Term. 8.H.
4. 2. a. Plow. 291.
Jenk. Cent. 4. c. 84. 1.
Rol. Ab. 432. for the
king's prerogative shall
not prejudice the buyer.
12. R. 2. dist. 3. 13. R.
2. Pledges 31. Plow.
487. b. Dier, 67. 22.
E. 4. Barr. 21. 3. H. 6.
Det. 17. Crompt. Just.
Peace, 68. b.

Whether a widow during her quarantine may defend the possession with force?

Co. Lit. 32. 34. 8. H. 6.
c. 9. Rast. Forc. Entr. 3.
2. Inst. 17.

[F. N. B. 377.]

the sureties the principal bargained and sold by indenture twenty oxen and certain cows and one bull for forty pounds in hand paid; in which indenture it was agreed that if the vendor discharge and save harmless the sureties from the penalty of the said bond, then the bargain and sale should be void; and also it was agreed that the vendor should have the use and occupation of the beasts at the will of the sureties, and use them as his own. And afterwards the first day of payment to the obligee was past, and no money paid by the vendor; and before the second day he killed himself, having the beasts in his possession; and the vendees seized the beasts as their own: and notwithstanding that the property was clearly in the vendees for the non-performance of the condition, yet it was ordered that the almoner should have the beasts, or the money for which they were sold, but then he shall discharge the sureties against the debtor &c. And all the Court was against me in this case.

Also another matter was moved, whether a woman staying in the house of her husband after his death for her quarantine until her dower be assessed, may defend the possession thereof with force, &c.

Trinity Term,

4. and 5. Philip and Mary.

Lord North's Case.

(45) **I**N the exchequer chamber this question was asked by the Lord Chancellor of all the Judges of both benches and Barons of the exchequer, between the *Queen* and *Lord North* upon an information in the exchequer, that *Lord North*, when he was chancellor of the augmentations, received a warrant from the council testifying the pleasure of king *Ed. 6.* That whereas he had sold to one *Renagre* four hundred fadders of lead, each fadder for 4*l.* 6*s.* 8*d.* the said lord chancellor should take order and see the delivery of them, and that he should take sufficient bonds and sureties for the king for the payment of the money, *s.* seventeen hundred pounds &c. at the end of eight years; by force of which warrant he ordered one *Thomas Bengier*, then his clerk at *Newbury* in the county of *Berks*, to take a bond of *Winchcome* and *Winchcome* of two thousand pounds for the payment of the said sum accordingly; and he took the bond for the king accordingly; and carried it to the chancellor his master, and delivered it to him (as *Bengier* hath said) to the use of the king; and he directly took a note or minute thereof in his own book, and immediately delivered it back to *Bengier*, to bail it over to the clerk of the court, who had the charge of the custody of the bonds and specialties of the king; and when *Bengier* had received it back, he practised with *Renagre*, and the two *Winchcomes* for four hundred pounds, or marks, to deliver the bond to be cancelled and suppressed, and so it was done, and all those persons are now alive. Whether *Lord North* upon this matter be chargeable and answerable for the bond to the queen by * law? was the question. And by the opinions of all *seriatim*, he is, by the rigour and extremity of the law; for the possession of the bond in him, or in his servant by his order, was to the use of the king, and he was charged to render it back to the king, or to that officer who had the charge of its custody, which was *Duke*, who was the clerk of the augmentation court, into whose hands it was

The chancellor of the augmentations delivers a bond, which he had taken for the queen by virtue of his office, to his servant to bail to the clerk to whom the custody of it belonged; the servant conspires with the obligor and cancels the bond, his master is chargeable to the queen for it, and so is the servant and obligor.

[Jenk. Cent. 5. c. 60. S. C.]

Dal. Rep. 41.

2. Rol. Ab. 156.

Roll. Cont. 300.

Dier, 238. b. 239. a.
Dr. & Stu. 134.

* [161. b.]

Fulb. Paral. fol. 3. a.
Dr. & Stu. 135. a.

[Godb. 295, 296. 11.
Co. 92, 93. 3. Mod. 323.]

never delivered; wherefore, &c. But in equity *Lord North* shall have for his relief the favour of the Court for his remedy over against the said four false practisers &c. to which practice *Lord North* was wholly a stranger, and guiltless. And this matter came to light by the shewing of the book of minutes of *Lord North* of his own proper intention to advance the profit of the queen, as the said *Lord North* asserted. But afterwards, *s. in Michaelmas Term*, in the 3d and 4th year of queen *Eliz.* on account of equity and good conscience, the said *Lord North* was exonerated therefrom by a decree and ordinance in the exchequer by warrant under the privy seal, and *Benger* and the heir of *Renagre* were charged with the entire sum in the bond &c.

4. Inst. 355.

Saunders against Lord Borough.

In a new assignment specially naming the place and its abutments, the abutments as well as the name must be proved.

Dier, 23.

2. E. 4. 26.

[Bull. Ni. Pr. 39.]

(46) **I**T was moved as a doubt in the Bench upon evidence to a jury between *Saunders* and *Lord Borough*, if a plaintiff in trespass make a new assignment, and give a special name to a place, and also assign abutments about every part of the place, *s. East, West, North, and South*, and name the abutments also; whether he ought to prove his abutments true, as well as the name of the place, or not. And many held, he ought to do it, for every word which is put in the assignment to make the place certainly known to the jury before the words, *s. other than in the bar*, are material, and the abutments parcel of the assignment. But *quære*, for there are different opinions of this. See a good case of such new assignment, *T. 9. Eliz.* fol. [264. a. & *M.* 267. b. post.]

(46) *Mich. 38, 39. Eliz. B. R. Gough v. Freston*, [Cro. El. 492.] In error upon a judgment in *C. B.* where the case was: In an action of trespass *quare clauisum fregit*, the defendant pleaded that the *locus in quo* is two acres of land lying in *D.* and justified &c. And the plaintiff [in his replication made a new assignment to which the defendant] rejoined; that the place alleged in his bar and the place now assigned by the plaintiff are all one, and not divers; and thereupon the plaintiff demurred in *C. B.* and there judgment for the plaintiff; and thereupon error being brought in *B. R.* it was adjudged by *POPHAM*, *FERNER*, and *CLENCH*, that judgment should be affirmed, for the rejoinder was insufficient; for the plaintiff's making a new assignment is a waiver of punishing any trespass alleged in the bar, and therefore the new assignment ought to be answered by matter, or bar, or by not guilty, and so is the book 27. *H. 8.* [7. pl. 21.] *Bro. Trespas*, 3. direct, yet *GAWDY* thought *contra*. [Bull. Ni. Pr. 92.]

In Cur.' Ward.'

(47) **I** T was found by office before the escheator, by virtue of a writ, that *I. S.* died seised of a manor and held it of the queen by knight-service generally, *s. that he held of the lady the queen by knight-service*; the heir was also found within age. Also it was found before the escheator in another county, that the said *I. S.* died seised of another manor, and held that of *B. C.* by knight-service, &c. First, Whether the first office makes a tenure *in capite* by the words of the tenure found generally as above. And then, Whether *B. C.* the subject lord cannot have a traverse to the said office *, by which he is thrown out of the wardship of the manor holden of him, in case the truth be that the first manor be not holden *in capite*. And BROOKE, SAUNDERS, GRIFFIN *Attorney General*, STAMFORD; and myself, thought that he ought to be put to a traverse in the first-mentioned case, because it shall be intended the best for the queen, *s. a tenure in capite*; and that he shall have a traverse, and this at common law. See a like case for *Hawton* heir in socage, and such traverse, where was found a tenure by knight-service of *Peter Compton* who was in ward to the king, and held over of the king, *anno 38. H. 8.* in the county of *Warwick*.

Office found that *I. S.* died seised of a manor holden of the queen by knight-service generally, the heir within age, it shall be intended land *in capite*.

And it being also found in another county that he died seised of another manor holden of *A. B.* by knight-service; *A.* may traverse the first manor's being holden *in capite*.

* [162. a.]

Co. Magn. Ch. 52. .
12. El. 293. 6. H. 7. 15. b.
1. H. 7. 3. b. 28.
29. H. 8. B. N. C. 113.
141. 10. H. 7. 10. Dier,
306. 329. 155. 156.
4. E. 4. 22. b. 2. Inst.
692. 12. Co. 135. 4.
H. 6. 12. Br. Travers
d'Office, 16.

[By 12. Car. 2. c. 24. all tenures *in capite* and by knight-service are taken away.]

Lady Wingfield against Littleton, Knight. 1557

(48) **B**Y indenture made between *Sir Anthony Wingfield, knight*, and dame *E.* his wife, and dame *Margaret Vere*, widow, her mother, in the 28th year of *Henry 8.* it was covenanted, granted, concluded, and fully agreed at the commencement of the indenture, in manner and form as follows, *s. that for love and favor, and divers other considerations, the said dame M. moving, she should assure the lands &c. (by name) by recovery before a certain day to the said Sir Anthony, his heirs, and assigns, for and to such uses and intents as in the said indenture afterwards should be declared. And the said Sir Anthony covenanted and granted to the said dame M. that he, within eight months then next ensuing after the assurance made, his heirs or assigns, would*

A. covenants by indenture to assure lands to B. her son-in-law in fee to the uses after-mentioned; B. covenanting to make back an estate for life, remainder to himself and wife in special tail, remainder to the wife in fee. No use was declared. Afterwards recovery was suffered, but no estate being made back, the use shall not be changed by the indenture. And, The wife, after B.'s death, may avoid a fine levied by him alone of those lands in his lifetime.

make

[See f. 96. a. ante.]

21. H. 7. 19. 7.
Dier, 308.
1. El. 166. a.

1. Keb. 161.

24. El. 311. b.
Dier, 79. a. 182. 55.
A. 235. a.
21. H. 7. 18.
B. N. C. 184.

2. Co. 71.

Winch. 36.

[Shep. Touch. 79, 80.
22. Vin. 213.]

Dier, 191. b. 290.

[Co. Lit. 326. Mo. 28.
1. Com. Dig. 563, 564.]

make or cause to be made to the said dame *M.* an estate for the term of her life of the said premises, remainder to the said *Sir A.* and *E.* in special tail, remainder over to *Eliz.* in fee: and further he covenanted to grant a rent-charge of twenty pounds *per annum* to a stranger in tail, issuing out of the said premises, within one year next after the making of the said indenture &c. and no more words of any use declared were written in the said indenture &c. And afterwards a recovery was had accordingly, but no estate was executed back by the said *Sir A.* &c. *Quare* Whether the use was changed after the eight months, or before, by virtue of this indenture and the statute of Uses, or not. Also admit that it was, then that *Sir A. W.* after the death of the said dame *M.* entered into the land, and aliened it by fine without his wife to *Sir Edward Littleton*, and died; whether the said *E.* his wife may enter by the stat. 32. Hen. 8. [c. 28. §. 6.] (49) At first it seemed to my lords the two Chief Justices, STAMFORD, Justice, and myself, that no use was changed by the indenture and recovery only without an estate executed; for the covenants above would then be impossible to be performed, &c. And also no use is afterwards declared, &c. And for the second point, they held, that clearly within the statute which speaks of the alienation of the inheritance or freehold of the wife by the husband (a); and

(a) So by 11. H. 7. c. 20. a fine levied by a *feme* after the death of her husband of lands which were of his inheritance is void. But where by an exchange of her land she became a joint-purchaser with him in tail with remainder to her in fee, a fine by her after his death was holden not to be within that statute, in the following cases from the MS. reports by Dyer, in the Inner Temple library.

Tborolde.

"*John S.* by indenture enrolled did bargain and sell the manor of *D.* to *I. D.* and to *Alice* his wife, and to the heirs of their bodies begotten, and for lack of such issue to the right heirs of the said *Alice* in fee, in consideration whereof the said *I. D.* † and *A.* his wife did bargain and sell by the same indenture to the same *I. S.* in fee the manor of *S.* which was the inheritance of the said *Alice*, and levied a fine thereof accordingly. Afterwards *I. D.* and *Alice* his wife had issue; and the husband died; the wife survived, and sold the

"said manor of *D.* to a stranger by fine in fee, and died. Whether the use by the consideration aforesaid be altered, *s. land* for land, not being an exchange or other assurance. Also, Whether the last fine levied by the wife doth bar the issue in tail, or be void by the statute 11. H. 7. [c. 20.] And at first it seemed to CATLIN, DYER, SAUNDERS, and WHYDON, it is good, although a bargain and sale, *s. land* for land. And as to the second, it seemed to CATLIN and DYER that it is not within the stat. 11. H. 7. [20.] because it is as well the purchase of the woman as of the husband; and the fee appointed to the wife; and that for recompence to the wife for the land of the wife; and no gift or advancement to the wife of her husband; and therefore out of the intent of the statute.

"And a like case was moved by SAUNDERS, Chief Baron, E. 16. of the precept queen, at table in our Inn. If a man seized of land in right of his wife in fee,

† Orig. *ac.*

"together

and † *so was the judgment.* And also for the first point, it was thought that after the eight months and the year passed, and * no estate executed, the use ought not to be changed; for then *M.* would have her first estate, *s. fee-simple*, which was never thought of. And no subpoena will lie for her as for a *cestuy que use*, to compel *Sir A.* to execute the estate, &c. because she has her remedy at common law, by action of covenant.

“together with his wife levy a fine executed, and take back by the same fine an estate tail to them, the remainder to the right heirs of the wife; they have issue, and the husband dies, the wife takes another husband, and afterwards they aliene by fine. And by the opinion this is out of the reason and meaning of the statute of

“11. H. 7. because it is of the inheritance of the wife, and not of the husband, nor his ancestors, or feoffees. And this fine of render shall not bar the wife from demanding dower of the inheritance of her first husband, &c. because it is not for jointure.”

† Orig. *et hic in arbitrio.*

Thurland's Case.

(50) **A PRISONER** in the Fleet in execution upon a condemnation was a man very necessary for the war; and it was moved by the Attorney General, by order of the Council, whether the prisoner might be licensed by the queen with a keeper to go to *Berwick* for the defence of it or not. And it was holden by all the Judges of both the benches, that he cannot be dismissed by protection, because he remains in safe custody, &c. Yet in the fourth year of queen *Eliz.* a letter signed with the hand of the queen and under the signet, was directed to *Tyrrel*, warden of the Fleet, to permit one *Thurland*, a prisoner there condemned for debt as above, to go about her business and suits with a keeper, without commanding him to take bail or baston, which the statute 1. Ric. 2. c. 12. requires him to do, although he have the writ, or command of the king. See the statute, and *quære* well, if the warden have such writ, or commandment of the king, and according to the statute he let the prisoner go out with a baston, Whether this shall excuse him towards the party for the condemnation, or only the forfeiture of his office to the king, or not.

One in execution shall not be delivered by a protection.

And if by writ or commandment of the king under 1. R. 2. c. 12. he be set at large, whether the gaoler is not chargeable to the party, *qu.*

Jenk. Cent. 5. c. 52. [and Dal. 23. pl. 2. S. C.]

Co. Lit. 130. a. Dier, 60. b. 245. 275. 2. Rol. Ab. 322. 7. El. 297. a.

[1. Com. Dig. 23.]

2. Inst. 187.

[Hob. 202. 3. Com. Dig. 182. Bac. Ab. Escape, (B.) per tot'.]

Where the defendant has lands in several counties, the plaintiff may have several *elegits* for the whole debt into each county.

Bendl. 15. S. C.

5. E. 3. 10.

2. 30. H. 6. g. a. 5. 2.

Hob. 57. 16. E. 3.

Execution, 49. 21. H. 7.

29. Styl. 453. Mo.

24.

F. Executors, 76.

Dier, 208 a.

19. H. 6. 32.

25. 27. 29. E. 3. 46. b.

8. 2. 9. b.

[1. Crompt. Pract. 346. and 352.]

(51) IT was moved by BROWNE, if a man who is condemned in debt or damages have lands in divers counties, and the plaintiff pray an *elegit* into each county for the entire debt or damage, whether he shall not have his prayer. And the clerks of the court said, that their course is, that the plaintiff ought to make divisions of his debt, as to ten pounds, &c. and as to other ten pounds, and so on. And divers precedents thereof were cited. And the Court held that the plaintiff if he will may have several writs for the whole into each county. And for this see *M. 17. E. 3.* [46. a. pl. 3.] in debt against executors, two writs of *fi. fa.* awarded into several counties for the entire debt. And in an action of waste, *M. 29. H. 6. Rot. 103.* the plaintiff for the treble damage of the value of the waste (without treble costs or other damage) had three writs of *elegit* into three several counties for the whole, &c. which record was seen there in court.

(51) *East. 20. E. 3. B. R. Rot. 75.* By writ of *certiorari* this manner of pleading was used in the *Iter of Macclesfield* in the county of *Chester*, and the plaintiffs recovered the entire debt by parcels, *s.* of thirty-six shillings and eleven-pence farthing, by divers writs, where it appears that *Edward Warrenia* and *Cecilia* his wife (to which wife an entire debt, *s.* one hundred and ninety-two marks six shillings and eight-pence was due) impleaded *John de Arden, Knight*, by sixty-four actions or counts, each count for only thirty-six shillings eleven-pence farthing, and by one verdict recovered in all the aforesaid actions, with damages of forty shillings at the same time in all the plaints aforesaid: but on account of those errors (and others apparent on the record) judgment was reversed and annulled, although the course of the *Iter of Macclesfield* was alleged, that it was in the election of the plaintiff to demand the entire debt by writ of debt in the county of *Chester*, or by divers plaints in the *Iter of Macclesfield* by parcels within the sum of forty shillings.

* [163. a.]

Where a man leaves land to his executor for thirty years, to the intent and purpose that they should pay annually therefrom thirty pounds to certain persons, whom he makes supervisors for the payment of divers legacies by them at divers times, remainder over; it is sufficient if the executor himself pay the legacies with consent of these supervisors, though not all at the very times when due.

(52) A MAN seised of lands in fee having no issue, willed by his last will in writing, that his lands should continue and remain in the hands, use, and occupation of his wife (whom he made his executrix) for the term of thirty years, for these intents and purposes following, *s.* First he willed, and his will and intent was, that out of the issues and profits thereof she should annually during the term pay to *A. B.* and *C.* whom he made supervisors, thirty pounds for the satisfaction and payment of divers legacies of money to be paid over by the said supervisors at divers and sundry times, and to divers persons in as short a time as it could be raised. And further he willed and desired his wife to be bound

bound in her widowhood to the supervisors for the performance of the will on her part according to the trust committed to her, and that she should always be advised by the supervisors, the remainder of the lands to the son of his brother (being his heir apparent) and the heirs male of his body, with divers remainders over to his blood and name in like entail, the fee to his own right heirs, and died; the wife entered, and took the profits of the lands for divers years, being of the annual value of thirty pounds, but she did not pay any money to the supervisors, but by their consent and agreement she paid and discharged all the legacies at divers times, but not all at the very times when they should duly have been paid; for which non-payment of the thirty pounds yearly to the supervisors the nephew as cousin and heir entered upon the wife. (53) And whether the words *intent and purpose* in a will shall make a condition or not, *quære*. Also, whether the condition (if there be any) be broken because the thirty pounds yearly was not paid to the supervisors nor to the legatees in due time, when it was done with the knowledge and consent of the supervisors &c. *quære*. The case was argued at the bar *pro et contra*. And on the day which was appointed for the Bench, the matter was compromised at the request of the parties; but the opinion of the Justices inclined against the plaintiff, *s.* that the entry of the heir was not lawful.

Instead of this case is a case of an use in the other Editions, [in *Edic.* 1592] which case you will find before in 3. and 4. P. and M. fol. 133. 134. 138. b.

Dier, 74.
B. N. C. 138. 15a.

[Shep. Touch. 120.
Bac. Ab. Condition (B).
a. Bro. Ch. Caf. 600.]

(54) **N**OTE, There was a meeting of the Judges at *Serjeants Inn* upon this case, *s.* Divers records of verdicts, at *nisi prius* taken in the circuits of *Kent* and *Suffex*, &c. this vacation were to be returned and certified into both benches, and the exchequer. And it was doubted whether the clerk of assize, in whose custody the records were, might bring in the said records (because both the Judges of this circuit, who were *MORGAN* and *PRIDEAUX*, before whom the verdicts were found, died * before the Term: and in other circuits, *s.* in *Norfolk*, &c. *LORD BROOKE*, Chief Justice; and in our circuit, *s.* *Lincoln*, &c. *STAMFORD*, Justice, in like manner, were dead;) without any writ of *certiorari* directed to the executors of *Morgan* in the first case, who first died, or to the administrators of *Prideaux*,

If the Justices of *nisi prius* die, the clerk of the assize may bring in the records without *certiorari* to the executors, and the form of the entry shall be as usual.

Jenk. Cent. 5. c. 59.
S. C.

[Doug. 194, 195. in notis. 2. Hawk. P. C. 411, 412.]

* [163. b.]
4. Magn. Chart. 424.

Fitz. 147. b. 2. H. 4.

4.

1. El. 165. a.

[See ante, 71. b. note (a)].

Trin. 22. E. 4. Rot. 317.
and simile, P. 10. H. 5.
Rot. 111. and H. 9. 5.
Rot. 310.

2. Rol. Ab. 629.

See 2. Inst. 424.

N. B. 21. a.

1. Rol. Ab. 51. 757.

Prideaux, who died last intestate, to make certificates. And see *Lib. Int. fol. 101. b. a certiorari sicut alids*, granted out of *C. B.* under the *teste* of the Chief Justice, directed to one of the Justices of *nisi prius* to certify the verdict; &c. into the Bench: But this was upon the death of king *Ed. 4.*

in the vacation time, whereby the authority of the Justices of the *nisi prius*, and also of the Bench, ceased &c. (55) And afterwards by the opinion of the Judges present, s. LORD SAUNDERS, LORD BROWNE, HIGHAM, *Chief Baron*, MASTER WHYDDON, MASTER CATLYN, MASTER RASTAL, and myself, the records shall well be received by the hands of the clerk of the assize, without *certiorari*, or any other form of entry than the ancient form, s. "at which day
" *here came the parties, and the Justices of assize before whom*
" *&c. sent here the records written in these words on the*
" *same day and place:*" and these words of the entry may be true, although the Judges are both dead † *after* the verdict taken. And also the words of the statute of *Westm. 2. c. 30. [13. Ed. 1. c. 30. §. 2.]* which gives authority to the Justices of *nisi prius* are, "and when such inquests be taken
" *they shall be returned into the bench, and there shall judgment*
" *be given, and there they shall be inrolled."* And the statute of *York, 12. Ed. 2. [stat. 1. c. 4.]* says, "and that
" *which the Judges shall have done in the things above-men-*
" *tioned shall be reported in the bench at a day certain, there*
" *to be inrolled, and thereupon judgment shall be given."* (56) And *14. E. 3. c. 6. [st. 1. c. 16.]* is, "that the Jus-
" *tices return the verdict under their seal, &c. which shall*
" *be received (in the king's bench), and there inrolled, and*
" *judgment given according to the verdict."* And also for

† Orig. per.

(55) In the petition of the Abbot of *Whitby* in parliament, 35. E. 1. at *Carlisle* in Mr. NOV's book, process issued against *John*, son and heir of *Galsford de Langley*, that he should cause to be brought the rolls, process, &c. to the exchequer, who returned that none had come to his hands. Cro. 56. [Keilway, 58. a. pl. 9.] If the sheriff die, it seems that his executor may return them, but the sure way is to continue the writs on the roll by an *ad quem diem vicecomes non misit breve*, and thereupon to sue a *sicut alias* (a).

(a) But now by 3. G. 1. c. 15. s. 8. if any sheriff shall die before the expiration of his year, or before he be superseded, the undersheriff shall nevertheless continue in his office, and execute the same in the name of the deceased till another sheriff be appointed and sworn; and the undersheriff shall

be answerable for the execution of the office during such interval as the high-sheriff would have been if he had lived. And the security given by the undersheriff and his pledges shall stand a security to the king and all persons whatsoever for the performance of his office during such interval.

another

another reason : Suppose error be assigned in the death of the Justices of *nisi prius* as above, it cannot be received, because it is merely contrary to that which the court of the bench did as Judges, for it is their discretion to credit the clerk of the assize more than the executor of any Judge : and the Court give faith and credit to any act done by a deceased Judge ; as in 1. and 2. *H. 7.* [2. *H. 7.* 10. pl. 3.] they received the warrant of attorney taken by *CATESBY, Justice*, in the country, who died in coming to the court at the Term. But see *H. 19. H. 7. Rot. 409.* a *certiorari* directed to *Frowicke* and others executors of *MARROW, Serjeant*, Justice of assize, with *BUTLER, Justice*, in the county of *Devon*, the presence of *Butler* is not expected to certify the *posita*. And *simile, M. 20. H. 7. Rot.* . and *T. 30. H. 8.* [ante, 41. b. pl. 8.] Proclamation upon an *exigent* returned by the sheriff who was discharged of his office of sheriff was adjudged insufficient because he was not sheriff at the day of the return.

Cro. 193. b.
8. *H. 4. 5. b.*
12. *H. 4. 10. a.*

1. *Rot. Ab. 565. 580.*

[*Dalt. Shff. 18. Imp.*
Off. Shff. 131. Bac.
Ab. Sheriff, (1.) See
20. Ges. a. c. 37. and
a. Term Rep. 1.]

*(57) NOTE, It was agreed for law by the two Justices, and others, that if a man have goods to the value of one hundred pounds, and be indebted in twenty pounds, and he devise and bequeath to his wife by his will the moiety of all his goods, to be divided equally between her and his executors, and make executors, and die, and the executors pay the debt, the wife shall have the moiety of all the goods, *i. e.* to the value of fifty pounds, without any defalcation for the debt, so as the executors have assets. But satisfaction, or selling of any parcel of the goods by the executors is good enough, and tolls the division of the wife in that parcel.

[* 164. a.]

If a man bequeath a moiety of all his goods to his wife, to be divided equally between her and his executors, she shall have a moiety of all he died possessed of, provided assets remain.

35. *H. 8. 59. b. ante.*
Swinb. 307. acc'.

Flow. 544. B.
Dier, 264.

[*Wentw. Exec. 252. cont'. but Suppl. to Wentw. 186. acc'.*]

M—— against Newton.

(58) NOTE, That a record was moved and brought into the bench out of the court of ancient demesne in the county of *Derby*, by writ of false judgment, at the suit of *M. v. Newton*, and the writ was, "under your seal and the seals of four lawful men of the said court, &c." when it should

Writ of false judgment from ancient demesne "under your seal, and the seals of four lawful men, &c." and omitting "et alius breve" in the conclusion.

2. Ro. Rep. 16. 45.
E. 3. 1. N. B. 18. b.
19. a. Register, 15. a.

[a. Lutw. 951.—4.
2. Cromp. Pract. 407.
Post. 373. a. pl. 13.]

Dier, 268. a.

9. H. 6. 3. a. 26.
9. H. 6. 4. a.
Dier, 329. a.

[2. Lord Raym. 1403.
1. Str. 606. S. C. 1.
Com. Dig. 345. Cowp.
426.]

should be "*under your seal, and by four lawful men of the said court, &c.*" notwithstanding *Fitz. Nat. Brev.* [39. E.] And also in the conclusion of the writ before the *teste*, these words are wanting, *s. and the other writ (a).*" And for these causes exceptions were taken, that upon this writ the Court cannot proceed upon the examination of the defaults in the record, and the defendant would not consent to have the writ amended by *Ridge* the chancellor who made the writ, and acknowledged his default and negligence in the court of the bench, and the Court doubted much what to do. And see 4. *H. 6.* fol. 4. in a certain long written report, by the opinion of all the Judges, in such case where matter of substance is wanting in the writ of false judgment, or writ of error (*b*), the plaintiff shall have another writ in the chancery, directed to the Justices of the bench, reciting the matter, and commanding them to proceed to the discussion of the errors contained in the record which remains with them. *Nota bene.*

(a) This must have been the writ issued where the tenant had aliened after judgment. *Reg. Brev.* 15. a. b.

(b) By 5. *Geo. 1. c. 13.* in cases of variance from the original record, or other de-

fect, all writs of error shall be amended, and made agreeable to such record by the respective courts where such writs of error shall be made returnable.

Basket against Lord Mordant.

A man having several commons in one place, one appurtenant to one messuage, the other to another messuage, cannot make a joint prescription for both.

[Bendl. 74.] } S. C.
A. Bendl. 8. }

Dier, 154. a.

15. H. 7. 10. b.
5. Co. 78. b.

[Vin. Ab. Prescription
(W.) Bul. Ni. Pr. 59,
60. 1. Bur. 441.]

(59) **N**OTE, Upon evidence to a jury of the county of *Dorset*, in *Banc*, between *Basket* and the lord *Mordant*, it was holden by the Court, that if a man have common in a down or waste for one hundred sheep, as appurtenant to a house, and certain acres of land, meadow, and pasture; and he purchase another messuage with certain land, which also has common in the same down or waste for other hundred sheep, as appurtenant thereto by prescription; if he make title in pleading by prescription in the entire for common appurtenant to both houses and lands together for two hundred sheep, he has failed in his prescription; for he ought to make two several titles and prescriptions for the two hundred sheep, and not to join both in one, for they are two distinct commons.

(59) If a lessor grant a moiety of the reversion to *A.* and the other moiety to *B. &c.* the lessee attorns accordingly, and then *A.* and *B.* grant to *I. S. &c.* the lessee commits waste, *I. S.* shall not have several but one action of waste, although he have the reversion by several grants and titles by *MEADE*, *Trin.* 26. *Eliz.*

(60) *ME-*

* Foxe's Case.

(60) **M**EMORANDUM, That in *B. R.* one *Stephen Foxe* was arraigned for a felonious rescous of one *Arthur Fisher*; and the indictment was, That whereas *Arthur Fisher* of &c. on the 16th day of *February* in the year &c. at *H.* in the county aforesaid, feloniously cut the purse of such a person &c. and sixteen shillings in money numbered &c. feloniously took and carried away, &c. whereupon one *W. Puller*, bailiff of the lord the king of his town aforesaid, took and arrested the said *A. F.* at *H.* aforesaid for the felony aforesaid, *et in salvâ suâ custodiâ adtunc et ibidem eundem A. habuit et custodivit* until *Stephen Foxe* of &c. *adtunc et ibidem* made an assault upon the said bailiff, and *adtunc et ibidem* feloniously took and rescued the said *Arthur* from the custody of the said bailiff, &c. And it was much doubted whether this indictment was certain enough for the time of the arrest and also for the time of the rescue; and upon this depends the whole: First, Whether the *adtunc* which is placed after the arrest may be referred to the arrest before by the copulative which follows, *s. et in salvâ suâ custodiâ adtunc et ibidem eundem A. habuit*; for the time of the arrest is material; and it seems that it cannot (a), for they are distinct sentences divided by the word *eundem* &c. yet *quære*. Also, Whether the last *adtunc*, *s.* of the rescue, may be referred to the whole day aforesaid, or only to that instant and time of the day at which the felony was committed, or to any time before in the same day. And *BROWNE* thought, that *adtunc* shall not extend to the whole day, but only to the instant of the felony committed, and therefore the indictment is not good without saying further, *s. on the same day* &c. But others thought otherwise, therefore *quære*.

HERTFORD.

Indictment for rescous stating "that one on the 16th of February, &c. committed felony, whereupon *A. B.* at *H.* aforesaid arrested him, *et adtunc et ibidem* had and kept him in custody until defendant *adtunc et ibidem* made an assault, *et adtunc et ibidem* rescued him." Whether the time of the arrest, and also of the rescue, be laid with sufficient certainty.

10. E. 4. 15. 28. H. 8.
14. b. 5. E. 6. 68. b.
69. a. ante.

[3. P. Wms. 484. 497.
2. Hawk. Pl. Cor. 334.
4. Bac. Ab. 400. 401.]

(a) This sentence in Italics is omitted in the old edit. of 1592 and in that of 1672. the last edit. and in that of 1621, but is in



* Michaelmas Term,

* [165. a.]

I. Queen Elizabeth.

RESOLUTIONS at SERJEANTS INN by all the JUSTICES, CHIEF BARON, ATTORNEY and SOLICITOR GENERAL, upon the Statute of the 1st of Edw. 6. c. 7. for Discontinuance by the Demise of the King.

(1) **FIRST**, The King who is heir or successor may proclaim and commence his reign on the same day that his progenitor or predecessor died. (2) Also all patents of the Judges of the one Bench and the other, the Barons of the Exchequer, Sheriffs, Escheators, and Commissioners of Oyer and Terminer, Gaol-delivery, and Justices of Peace, are determined by the death of the King who made them; otherwise it is of coroners who are chosen by writ. (3) Also if an original be purchased in the time of one king, and he die before the return of it, the original is gone, and cannot be returned in the time of the next king. But all process issued upon any original depending in any court of record in the time of the king deceased, may be executed and returned in the time of the new king by the clause in the statute, viz. "*but that the process, pleas, &c.*" And so it was put in use in *Mich. 1. Mary* in both Benches. (4) Also *quare*,

(3) *East. 1. Car. B. R.* The executor of an executor was sued for legacies, and pleaded no assets, which was refused by the spiritual court, and for this a prohibition was awarded out of the King's Bench in the time of king *James*; and the question was, Whether this was discontinued; and upon argument the Court resolved it was: and a difference was taken between a prohibition awarded out of the King's Bench and out of the Common Pleas; for out of the Common Pleas a prohibition shall not be awarded without a suggestion first of record, and for this, it is there the suit of the party; but it is otherwise in the King's Bench, and is merely prohibitory. Another difference is, when a prohibition issues out of the King's Bench, † (if there be no other process) there it is discontinued by the demise of the king; but if an attachment issue and be returned, or if the party appear and put in bail, then it is become the suit of the party, and is not discontinued. By *DODERIDGE*, In an action for *scandalum magnatum* the declaration is "*as well for the lord the king as for himself*," and is not discontinued by the death of the king, for the contempt of the king is collateral; but it is otherwise where the king recovers part.

East. 1. Car. B. R. Cateby and Baker's Case. *Cateby* recovered in a *quare impedit*, which see 6. Coke, [61. b.] and now sued a *scire facias* against the incumbent *B.* who pleaded a release, which was found against *B.* The king died, and *JERMIN* moved, that this is discontinued by the demise of the king as an extent, post. fol. 205. [b. pl. 2.] *Et non allocatur*, for it is process.

† Orig. *simul auter processu*.

[165. a.]

Michaelmas Term, 1. Queen Elizabeth.

4 H. 7. 7. 1. E. 3. 3.
1. AF. 2. Dier, 205.
Lambert, 96.

[2: Hawk. P. C. 32. 35,
36. 2. H.H.P.C. 35.]

if Justices of Oyer or Gaol-delivery reprieve any prisoner after judgment of death, whether the new Justices may command execution upon him by reason of the words of the statute, which are of reprieves before judgment.

Hilary Term, 1. Queen Elizabeth.

* [165. b.]

Of the king's prerogative respecting imposts and customs, and restraining his subjects from going out of the realm.

Davis, 8. b. 4. Inst. 39.
Vaugh. 161. 163. F.N.
B. 85.

(5) *MEMORANDUM*, That lately in the time of the queen *Mary* a new impost or imposition was put upon cloth as a custom more than the ancient custom granted by parliament, as it is asserted in the 21st of *Edw.* 3. * that it was but fourteen pence of every *English* merchant and twenty-one of aliens. And now the merchants of *London* found great grievance, and made exclamations and suit to the queen to be unburthened of this impost, because it was not granted by parliament, but assessed by queen *Mary* of her absolute power †. And on account of this doubt there were divers assemblies and conferences by the Justices and others; and the first point moved was, Whether a custom commenced in any case first by the grant and benevolence of the merchants, or by the limitation of the king; and thereupon it is to be considered, whether a subject generally may withdraw his person out of the realm for merchandize, travelling, or any other cause, at his free-will and pleasure, by the sole license and permission of the common law of this realm; and further, whether he can convey his goods out of this realm without leave of the king. (6) And for this see *Fitzberbert's* Treatise in the writ *de securitate inveniendâ ne exeat regnum* [f. 192, 193.], where his opinion is declared that he might

Dy. 43. b. 92. a.

Dav. 9. b.

13. El. 296. a.

N.B. 85. a. Mo. 675.

† *Mich.* 13. *E.* 4. *Rot. Patent. Mem.* 1. a. That this custom was granted to the king by the commons of *England*: and so 26. *E.* 3. in *Memorand' Scacc'*. And so in the records about 26. *E.* 1. that is called the New Custom (which is now called the Old); but *non constat* when or by which parliament this was given to the king, for perhaps the record of it is lost.

(6) *Trin.* 36. *El.* C. B. Debt was brought upon bond conditioned to pay money to the obligee at his return from *Rome*, and the defendant paid money into court, and *DENT*, *Queen's Serjeant*, prayed that the money might remain in the court for the queen until license of departure was shewn, for if he depart without license all his goods shall be forfeited, which the Court allowed.

well

well do it before the statute of 5. R. 2. [ft. 1. c. 2.] which prohibits all except the great persons of the realm, notable and true merchants and soldiers, upon pain of forfeiture of all their goods. But *Fitzherbert* agreed that the king by his general proclamation or special prohibition by writ may restrain his subjects from going out &c. without his special license, and if any one attempt to do it, it is a contempt. But *quære* well of his opinion; for by the words in the first part of the writ, *viz. absque licentiâ nostrâ clam destinâs exire vel te divertere ad partes externas*, this argues that he cannot go out unlicensed by the king, &c. and although afterwards it is suggested in the writ, that he intends to prosecute out of the realm *quamplurimum regi et regno suo prejudiciali in contemptum regis*, this cause is not traversable by the subject, and the very departure without special license is a contempt as much as &c. therefore *quære* well of this. (7) Note, That *English* merchants do not pay at common law

[repealed by 4. Jac. 1. c. 1. § 22.] 2. Inst. 54.

[1. Hawk. P. C. 91, 92. 11. St. Tr. 60, 61. 1. Bl. Com. 266. 4-122. 4. Bac. Ab. 170, 171.]

9. H. 6. 12. Br. Cust. tom. 26. Davis, 8. g.

any

(7) NOTE, resolved and adjudged in the great case of Currants, [*Mich. 4. Jac. Bates' Case*, Lane, 22. & 11. State Trials, 29. &c.] that the imposition of eighteen pence upon currants by queen *Eliz.* and another by king *James* of 5s. 6d. more upon every hundred weight was lawful; and the reason, because the king has absolute power as well as ordinary: absolute, as in war, peace, league, treaties, trade; and that the law in such cases as these is not to be looked for in books of law, but out of precedents of the exchequer, and that it is grounded upon policy which is not disclosed; and that imposition upon wools, &c. was by no statute at all but by prerogative merely, and that it has been increased often to 40s. a sack, and again diminished at the suit of the commons giving a consideration for it: *a fortiori* he may upon foreign commodities, and that the impost upon wines was set 16. E. 1. and the collector charged with them, as appears in the exchequer, of 4s. upon the tun, which was increased to 17s. in the time of H. 8. and by queen *Mary* to four marks; and wine is more necessary than currants, and therefore &c. Another reason is, because it is not a burthen to the commonwealth, but to delicate mouths. And it was agreed by the Barons, that the king may restrain his subjects from going beyond sea, or carrying or sending their goods over sea, for these goods are a burthen to the commonwealth. And they also clearly agreed, that he may prohibit the importation of a foreign commodity, and for the same reason may say that they may import upon such condition of payment, or otherwise; and the ports are the gates of the sea, and so it is proper to pay for coming within them for safeguard; as toll for murage or pontage, &c. is for the same reason imposed, the statute of 11. Ric. 2. [c. 9.] vouches. Also, that no impositions or charges be put upon wools, leather, or woollfells, other than the custom of a subsidy granted to the king in this present parliament, and if any be, the same shall be repealed and annulled, as it was another time ordained by statute [45. E. 3. c. 4.], saving always to the king his ancient rights, which is explained of putting on impositions where occasion serves, because "*other than*" excludes from that saving custom &c. and because he may grant safe-conduct to a stranger to come into *England*, that he would make it to ten thousand, or as many as could seize the realm, is too injurious a suspicion; and the king ought to be guided and ruled by his own prerogative. And *FLEMING*, Chief Baron, said also for law, that the king has prerogative power upon trade as the cause, *ergo* upon particular merchandize as the effect, for he may prohibit, as king H. 3. and E. 1. that no goods should be imported or exported to or from *Brabant* and *Hynault*. And he said, that this imposition is not upon goods of the realm at home, but a commodity of the *Venetians* abroad, and not upon ours (which by objection was said to be done), but upon foreign commodity coming into his ports; as no toll for pontage or murage upon the highway, but upon a bridge where &c. And if foreign princes put, as the duke of *Venice* did, a ducat upon an hundred weight, upon which the king imposes 5s. 6d. that in reason of state is good, for each coin is known to him. And as for him [*s. Bates*] every merchant respects his own lucre, and will not import without hopes of it; therefore if he import a

Co. Mag. Char. 58, 59
cont.

any custom for any wares or merchandize whatever, except three, viz. wools, woollfells, and leather, namely, for every sack of wool containing twenty-six stone, and every stone fourteen pounds, one half-mark; and for three hundred woollfells half a mark, and for a last of leather thirteen shillings and fourpence; and this was equal to the stranger as to the *English* merchant; and this custom is called the Great or Old Custom. And in the time of *Edward I.* the merchant strangers, in consideration of certain liberties and immunities to them granted by the king and remission of prisage, gave and paid *gratis* to the king three shillings and fourpence beyond the ancient custom, as appears in the record of the exchequer 31. & 32. E. 1. which increase * was called the New or Small Custom; and this by the opinion of *Smith*, clerk of the pipe.

* [166. a.]

Magn. Chart. Raft. Fran-
chises, 3.

thing charged it ought to be subject to the charge: and the rule of the ordinary power of the king is the common good, but of his absolute *salus populi suprema lex est*; and who shall examine the king, whether that imposition be better than a subsidy, above all perhaps the king having need to provide in peace for war, and having undertaken to defend merchants by letters, ambassadors, reprisals, and *usque ad gladium*. And to say that if this is lawful, then he may put impositions upon all things, is as if one should say, he can pardon one felony, *ergo* he will pardon all, and if 5s. then 20s. &c. this is to corrode the bowels of the republic, and in that of the king himself; and concluded *Bates* the merchant for not obeying the proclamation to be in contempt (a).

(a) There seems such extraordinary confusion in this note in the original, and so many typographic errors, that it is impossible to translate it as it stands there. As the case is reported in *Lane*, 22. and in 11. St. Tr. 29. may be seen at great length the subsequent proceedings in parliament in consequence of this determination of the court of exchequer; I have not transcribed the

original. By comparing the obscure passages with the report in *Lane*, I have endeavoured to form conjectural emendations, but such only as I supposed necessary to reconcile it to sense without contradicting any of the reasoning there adopted. The general intention of the case may be understood from *Vin. Ab. tit. Prerogative of the King* (E. a. 48.).

Audley's Case.

A. makes a feoffment in 8. H. 7. to the intent of performing his will; afterwards by indenture he declares his will to be, "that the feoffees shall stand seised to the payment of his debts, and afterwards convey back an estate-tail to him and his wife;" no reconveyance being ever made by the feoffees, this use is not changed, and the feoffees hold to

(8) *JAMES AUDLEY*, knight, Lord Audley, who was attainted in the time of *Henry 7.* for an insurrection at *Blackheathfield*, in the eighth year of the said king enfeoffed *William Hody*, chief baron of the exchequer, *Hugh Luttrell*, knight, and others, of the manor of *Nether Stoway*, and divers other manors in the county of *Somerset*, to them and their heirs in fee; and afterwards by indenture reciting in *English* the date of the deed of feoffment aforesaid, and the feoffment to have been made to the intent that they with the same manors should perform his will, "Know ye that my

" will

"will is, that the said *W. Hody* of the revenues &c. shall receive such money as they have lent him [me], viz. one hundred pounds, and also to stand seised to the payment of my debts upon bills subscribed with my hand. And also the said feoffees after my debts paid shall make estate to me the said Sir James Audley, and to Joan my wife, and to the heirs male of my body by [upon] her lawfully begotten, and for lack of such issue to mine heirs for ever. In witness &c. to this will, &c." Which James had issue then by another wife, and afterwards he had issue one James by the said second wife, s. Joan, and no estate was ever conveyed back by the said feoffees: Whether the use was changed immediately by the abovesaid words, was the great question between the said James Audley the son and the heir general of Lord Audley.

the use of the heirs general of A.

2. Leon. 159.
4. Leon. 166. 210.
[Dal. 88. pl. 3.] S.C.
[Jenk. Cent. 5. c. 62.]

[22. Vin. Ab. 261.]

Dier, 136. 314. b. 162. a.

Dier, 96.

(9.) And as it seems by the opinion of several Serjeants and Judges no use was changed above, because it is not a last will, but an intent &c.; and although the feoffees shall be seised to the use of the feoffor and his heirs, because there was no consideration that they should be seised to their own use, this cannot make a new use of an entail to James and Joan his wife without estate conveyed to them, because the wife is a stranger to the land and to the ancient use &c. And note, That this cannot be a testament or a last will to take effect by death; for it appears that the estate ought to have been executed in the life of the testator, &c. And the case was again moved in the second year of queen Eliz. in Hilary Term; at Serjeants' Inn, by the Lord-Treasurer and by the Sub-Treasurer and Chancellor of the Exchequer, to all the Judges, who thought the law as above; and in Michaelmas Term in the third and fourth year; before the

A feoffment without consideration shall be to the use of the feoffor. See Benl. 16. pl. 20.

Vide H. 11. H. 4. in the petition of Lord de Cammeyes, 5. 52. Dier, 146. Mo. 515. 19. H. 8. 11.

Such words in a will would alter the use, 1. M. 96. but this being by indenture, nothing shall be changed before the estate is executed. 31. H. 6. Subpoena, 23.

[But Dal. 88. pl. 3. S.C. is contra, that an use was raised presently.]

(9) East. 17. Eliz. In the case of *Hummerston*, which is cited folio 357. [a. pl. 36.] one point was on a recovery being suffered to the intent that the recoveror should make estate to *Hummerston* and his wife for their lives, remainder *seniori puero* in tail, remainder over: and it was agreed, that after the recovery suffered the recoverors shall be seised to their own use, for if they were seised to the use of *Hummerston*; then they could not make the estate: but by *SOUTHCOY* and *WRAY* they ought to do this in convenient time, otherwise an use would be raised in him against whom the recovery is had; and they agreed that the word "intent" is a good word to create an use, but not presently as the case here is. And 17. Eliz. *Betnam v. Bateston* [4. Leon. 22.] in *ejedione firmæ* one point among others was, A fine was levied, and indentures leading the use, and the words were, "the fine was levied to the intent that they should make an estate to him to whom J. E. the father (who was the comor) should name;" and there was a proviso in the end of the indenture, that the comor should not be seised to any other use except unto that use specified; and holden by all the Justices, that it shall be to the use of the comor themselves immediately as above, and after the nomination they shall be seised to the use of whomever he names; and if J. E. die without nomination, then the law will settle the use in his [heir].

Lord-Keeper of the Great Seal and the other Judges, and ordered as above, until proof was made of making back the estate to *James* and *Joan*. See more *Easter*, 15. *Eliz.* fol. [324. b. pl. 37.]

* [166. b.]

* Stokes against Porter.

What possession and receipt of the deceased's goods or debts shall be sufficient to charge a man as executor, and what disposition of them shall make him executor *de son tort*.

Mich. Ult. Rot. 422.

1. And. 11. Mo. }
14. [Benl. 72. } S. C.
pl. 116. }

Bendl. 36. 6. 3. 114.
115. Liver de Entries,
206. Went. 255. 5. o.
31. 2. Brown. 183. Dy.
255. b. 266. a. 5. Co.
33. b. affint adjudged
20. H. 7. 5. a. 2. Mar.
105. b. 8. H. 6. 36. a.
41. E. 3. 31. b. 32. H.
6. 7. a. 21. E. 4. 5. a.

(10) **STOKES** brought an action of debt on bond against *Porter* as executor of the will of one *H. Wyrral*; the defendant pleaded *ne unques executor, ne unques administer come executor, &c.* The plaintiff averred that he administered as executor divers goods of the said *H. W. &c.* upon which issue was joined, and the jury found this special verdict, viz. "that the said *H. W.* at the time of his death was possessed of divers parcels of goods and chattels, and shewed what in certain, and the value, as of his proper goods, and that after his death the defendant received of one *I. D.* seven pounds of a debt which he owed to the said *H. W.* in his life-time, for which he made him an acquittance; and that also the defendant, after the death, and before the writ purchased, took and had in his hands all and singular the goods and chattels aforesaid, and the said seven pounds used, occupied, and disposed of at his will and pleasure to his own advantage and profit. And whether this use, occupation, and disposition be an administration in law, the jury pray the advice of the Court, &c. and if it be, then they find that the defendant administered as executor, and assess damages and costs &c." And it was debated at bar and at bench; and it seemed to us three, *s. H. BROWNE, A. BROWNE, and ME*, that it is sufficient administration. And first, the definition of the word administration is, an ordering, making, or a disposition, and more properly applied to an officer. And for a ground of the same argument I intend, that by occupation or possession, the goods of the dead give notice of the person who shall be charged as administering, be he ordinary or executor, and draw the charge to him, as debt against the dean only, guardian of the spiritualties during the vacancy of the see, *ad cujus manus bona intestatoris devenerunt*, without the chapter, 17. *E. 3.* [Fitz. Ab. Tit. Bre. 822.] *T. 16. E. 2.* [fol. 490.] where the
dve-

Dier, 305. Wentw. 58.
21. H. 6. 28. 11. H. 7.
73. Dier, 271. a. 2.
Rol. Ab. 223.

devenereunt was the issue. (11) And see the Register, fol. 141. and 35. H. 6. [42. pl. 4.] against the abbot of *Saint Albans* to whose hands &c. and against one executor only, who had possession of the goods, the action well lies &c. And in *M. [T.]* 8. E. 3. [52. b. pl. 42.] in dower against one executor only who had the sole guardianship, it names him guardian and not executor; and that possession charges one as executor *de son tort demesne*, see 5. E. 4. in the Long Report, fol. 72. and 9. E. 4. [33. a. pl. 7.] in debt against the executors, and 35. H. 6. fol. 42. by *Moyle*, and 50. E. 3. fol. 7. [b. pl. 15.] and 33. H. 6. [31. b. pl. 5.] where the wife took more of her apparel than was fitting for her degree without legacy or license, and it was holden an executorship *de son tort demesne*. And yet some possession is colourable, and still none in law to charge &c. as expences about the funeral; one made coadjutor or overseer; one who has *litteras ad colligendum*; a man who is made executor by a will, which will afterwards is disproved by the proving of one later; and a feme covert made executrix who does not intermeddle &c. and renounces after the death of her husband: and all those cases where a man has colour by any authority and law to intermeddle, he may plead the special matter, *sans ceo* that he administered * in any other manner &c. But where he claims title or interest in the goods as by gift of the testator in his life, he shall not say *sans ceo* that he administered any other goods or in any other manner, but *absq. hoc quoad ut executor*, 9. E. 4. [33. a. pl. 7.] 10. H. 7. fol. 28. [b. pl. 19.] (12) Also the plaintiff would be without remedy for his debt if he should not have the action above. And if a lawful executor mal-

Br. 456. Co. 5. E. 4.
52. 32. H. 6. 7. 20.
H. 7. Cro. 63. 5. Co.
34. 13. H. 6. Execut.
22. 1. Rol. Ab. 918.
3. Cro. 254. 37. H. 6.
28. a. 11. H. 4. 84.
10. 13. 19. 36. H. 6.
26. 6. 14. 6. 10. 20.
H. 7. 10. & 27. 5. Dier,
255. 5. H. 5. 11. 21.
E. 4. 5. 20. H. 7. 5. a.
21. H. 6. 28. a. 10. H. 7.
15. b. 3. H. 6. b. Br.
11. 9. E. 4. 40. Execut.
36. 20. H. 6. 1. Exec-
cut. 15. 3. 31. 33. H. 6.
35. 13. 3. P. 3. H. Ro.
112. Nota per Bill, 21.
H. 7. Cro. 81. Went.
248. 295.

* [167. a.]

11. H. 6. 35. a. 9. E. 4.
40. a. 30. 31. H. 6. b.
27. 10. H. 7. 27. a. 2.
R. 3. 18.

(11) Administration is committed to *A.* and afterwards repealed and committed to *B.* *B.* cannot avoid any grant made by *A.* and if he sue any one for it prohibition lies, but *B.* may sue *A.* in the spiritual court to make account to see how much remains, and prohibition does not lie, *M.* 13. *Jac. C. B. Wadsworth v. Andrews*, *Mason's Reports*, [2. Rol. Ab. 283. pl. 8. H. 15. *Jac. B. R.*] *Mich.* 14. R. 2. Rot. 81. *B. R. West.* & *Job. Elmeed* recovers before the king 60*l.* against *Richard Kenial* for damage for *maibem*, and after judgment and before execution, defendant died. *Lucy* his wife executrix sold some goods for the burial of the intestate, and as to the remaining goods she renounced the execution before the bishop and did not otherwise intermeddle, and holden a good answer. But it was found that the distributed also to the poor of the goods of the testator, and as executrix prosecuted writs. Therefore execution awarded against *Lucy*.

Adjudged *Trin.* 30. *Eliz.* Rot. 403. *B. R. & Ireland*, against whom the action will lie for taking a dog, because in that a man hath property [see 12. H. 8. 3. a.]. And by *Mr. Corbet*, in his lecture in *Furnival's Inn*, An. 1630. in *Len'*, That one may be executor *de son tort* for the taking of this dog. See *Trin.* 1652. *C. B.* fol. 20. a. & *Barker's Case*.

Mich. 2. *Jac.* Rot. 3403. & *Gerret v. Carpenter*, a wife for milking the cows of the husband adjudged to be executrix *de son tort*.

An executor *de son tort* shall not answer for more than comes to his hands, by *Coke*, 10. *Jac.* And he said, it was a foolish opinion in any one who thought to the contrary.

[2. Term Rep. 97. 597. Vin. Ab. Executor C. a. 1. Com. Dig. 264, 265. 2. Bac. Ab. 387. 391. Godolph. part. 2. c. 8. See 3. Term Rep. 587. a. Hen. Bl. 26.]

administer, s. by converting the goods to his own use, he shall be charged and shall be an executor by tort, and without authority by such malfeasance in many cases to avoid the charge would be unreasonable: and suppose the defendant himself in pleading had confessed the matter above found by the verdict *sans ceo* that he administered in any other manner, would he not be condemned? *Credo quod sic &c.* And the receipt of the debt above is plainly a thing done as executor; for by no other colour could he demand it; wherefore &c. And afterwards before the next Term, the defendant died before judgment given, wherefore the whole matter fell. But CATLYN, SAUNDERS, WHIDDON, and WRAY, were of opinion with the three Judges above, H. 15. of the present queen [post. 255. b. pl. 8.]; but MANWOOD *à contrà*:

5. Co. 34. b.

21. E. 4. 5. a.

Sir T. Wroth's Case.

The patentees themselves of lands &c. granted by the crown, as well as purchasers of parcels from them, are entitled to a *constat* of their letters patent under statute 3. & 4. E. 6. c. 4.

32. H. 8. Br. Patents, 97. 2. El. 179. b. Co. Lit. 215. B. N. C. 192. Grants. Raft. 2. Vide Stat. 13. El. c. 6. 5. Co. 53.

[Co. Lit. 225. b. 4. Com. Dig. 399.]

(13) **L**ORD Rich and Sir T. Wroth were joint patentees of an office of *Waltham-forest* for the term of their lives by letters patents of the court of augmentation; the enrolment of which remain in the exchequer: Lord Rich in the absence of Mr. Wroth beyond sea surrendered the patent in chancery, which was there cancelled and a memorandum of it made on the back, but it was not enrolled that they had both surrendered &c. And upon this a new patent was made by Queen Mary to Sir E. Walgrave, reciting the former surrender in both names to have been made. And now Mr. Wroth since his return sued to have an exemplification or *constat* of the patent by the statute of 3. & 4. E. 6. c. 4. and required the lord keeper of the great seal to grant a *certiorari* to remove the record of the enrolment out of the exchequer into the chancery with intent to make a *constat* of it. And it was much doubted whether the patentee himself shall be intended within the purview and benefit of the statute aforesaid, inasmuch as the title and preamble of the act declare the mischief that those who purchase parcel of the lands contained in the patent of the patentee or his heirs, sustain by

Although a patent be surrendered, yet before a *vacat* entered a *constat* is grantable; but not after the *vacat* is entered upon the roll. This was *q. Sir Robert Sidnie's Case*, and that 32. H. 8. Br. Patents, 97. is to be so intended.

the surrender or loss of the original patent; and holden as it seems by the first sentence of the purview, that the patentees themselves are aided.

Trinity Term,

1. Queen Elizabeth.

Taw, Executrix &c. against Bury.

[* 167. b.]

(14) **D E B T** by *Elizabeth Taw* executrix of the will of *I. Taw* against *Bury*: and she counted upon a bond of forty pounds made and bearing date the 12th day of *January* in the 3d and 4th years of the reign of *Philip* and *Mary** at *London* in the parish of *St. Mary le Bow* in the ward of *Cheap* to be paid at the Feast of the Purification next to come. The defendant pleaded, that "he ought not to be charged by this writing, because he says that he on the first day of *May* in the year aforesaid, which was three months and more afterwards, at *Exeter*, in the county of the city of *Exeter*, the aforesaid writing caused to be written and sealed, and then and there afterwards delivered the same to one *B. C.* to deliver to the aforesaid testator as his deed; and afterwards, s. on the 25th day of the same month of *May* at *London* in the parish of *Saint Dunstan* in *Fleetstreet*, the same *C. &c.* offered to deliver to the aforesaid testator this writing as the deed of the said defendant, and the said testator the same to receive as the deed of defendant then and there wholly refused, wherefore the same *B. C.* then and there left the said writing obligatory with the aforesaid testator, as a schedule and not as the deed of the said defendant; and so *non est factum*; and of this he puts himself upon the country;" to which the plaintiff demurred in law. (15) And **SIR H. BROWNE** and **MYSELF** thought

A. delivers a deed to *B.* to deliver as his deed to *C.*; *C.* refuses to receive it; *B.* leaves it; *C.* takes upon it, and recovers. *A.* pleaded the special matter, and so *non est factum*; and bad, because it was his deed by the first delivery.

C. declares upon it as dated 12 Jan. Plea that it was made on the 1st of May is bad, because it does not answer the bond declared on.

Hil. Ult. Rot. 442.

1. And. 4. Benl. 75. S.C. See the record of this case in the book of entries, Tit. Det. pl. 24. fol. 145.

3. 5. Co. 26. 119.

Non est factum a good plea in this case, 5. Rep. 119.

[Salk. 307. Cro. Eliz. 54.]

19. H. 8. 8. a. 29. H. 8.

34. b. 8. H. 7. 13. a.

2. Co. 96. a. 8. 21. H. 6.

8. 9. 11. H. 4. 79.

Dier, 171. b. 324. a.

(14) *Eaft. 1. Car. B. R. Ward v. Kidswin*, [Palm. 407. Latch. 4. 77. & 86.] The plaintiff declared an obligation to have been made at *London*, where it appeared upon the reading of it that it was [made at *Hamborow* and] good, for though a deed be dated at one place, it may be sealed and delivered at another. And *Hamborow* shall not be intended for a vill, but for a place. See 31. H. 6. [Fitz.] *Fait* 104. 21. E. 4. 26. See also the case between the bishop of *Norwich* and *Cornwallis*, Hil. 21. Jac. Rot. 92. [Latch. 59. 1. Jon. 66.] and argued *E. 1. Car. B. R.* for the same matter.

Litt. Rep. 252.

See 2. Cro. 264. 3. Cro.
773. Br. Departure, 20.
2. H. 6. 4. Perk. 30.
Feoffments, 95. 22. H.
6. 57. a. 6. E. 3. 184.
Dier, 221. b. 14. H. 4.
27. Perk. 150. 152. 32. a.

25. E. 3. 38. b:

22. E. 3. 16. Vifne 7.
F. Estoppel, 206. 2.
Co. 4. b. 22. Aff. 89.
12. H. 6. 2. a. Dier,
251. 8. 11. H. 6. 16.
49. a. 21. E. 4. 28. Bro.
faits, 28.

[Sheph. Touch. 58.
Cro. Jac. 264.]

16. Aff. 18. Perk. 142.
144. 145. Dy. 95. 12.
27. H. 6. 77. 3. Cro.
54-

2. H. 6. 7. b. 3. 5. Co.
26. 119. 12. H. 7. 6. 7.
a. Leon. 322.

* [168. a.]

5. E. 4. 37. 34. H. 6. 19.
19. H. 4. 44. 58. 59.

this no plea: first, because it does not answer the obligation on which the plaintiff declared; for the obligation which was made and delivered at another time and place a long time afterwards, cannot be intended by any reason the obligation upon which the plaintiff founded himself, which took all its effect at the time of the date; and if the defendant had pleaded a release in bar after the date aforesaid, the plaintiff would not be received to aver a first delivery of the obligation after the date of the release, for this would be a departure by 5. H. 7. [27. a.] in *quare impedit*. Otherwise it would be if the plaintiff had declared in this form, *s.* by his writing bearing date &c. without saying any thing of the delivery &c. And by 22. H. 6. [13. a.] in *formedon*, a deed, if it be denied, shall be tried in the county where it bears date, and not where the delivery is alleged; otherwise is it where *durels* is pleaded in a foreign county. And see 3. Ed. 2. [68.] and 4. 12. E. 3. and other books where a deed may be by special matter averred to be delivered as a deed before it bears date for an infant, &c. And yet *quare* by 12. H. 6. [1. pl. 3.] Also note 1. H. 7. [14. pl. 2.] and 5. H. 7. [13.] and 8. H. 6. [21. pl. 7.] and 18. H. 6. fol. 8. [pl. 7.] and 10. [pl. 9.] and 27. H. 6. 7. [pl. 3.] and [E.] 19. H. 8. *cas. ult.* [8. pl. 12.] where a deed may have two deliveries. And in this case here, by the first delivery to *Calnady* without speaking of it as the deed of the party, the deed was good, and was in law the deed of the defendant before any delivery over to the party, and then the refusal of the party cannot undo it as the deed of the party from the beginning. (16) Otherwise it would be if the first delivery had been made to *Calnady* as an escrow, to deliver over to the party as a deed upon condition performed, &c. And the plea is *non est factum suum*, and that has no respect to the obligee; for if the obligee be a monk, or it be another person who bears the name of the obligee who sued the obligation, yet in those cases the obligor cannot safely plead *non est factum suum*. Otherwise it is if another person than the obligor, namely * one who bears his name be sued, he may well plead *non est factum suum* without pleading the special matter; which see for the diversity 4. 14. H. 6. and 16. H. 7. [7. pl. 10.] in *Paulet's case*; and then it seems the conclusion of the plea, *s. et sic non est factum suum* is repugnant and contrary to the premises, which acknowledged it his deed &c. And for this see 9. H. 6. [37. a. pl. 12.]

And

And afterwards judgment was given for the plaintiff, very much against the opinion of A. BROWNE; but others of the king's bench agreed to this judgment: but yet the judgment was reversed in *B. R. Hil. 3. Eliz.* but that was for a manifest discontinuance in the pleadings, and not for matter in law (a).

FENNER and WILLIAMS held expressly that a discontinuance could not be amended, *Baker and Frend, East. 52. fol. 30. a.* [*Frend v. Baker, Trin. 1652. Styl. 339.*]

(a) By 32. H. 8. c. 30. after verdict judgment shall proceed notwithstanding any discontinuance, discontinuance, &c. and shall stand without reversal, as though no such default had been. And 4. Ann. c. 16. extends

this to judgments by confession, *nihil dicit, non sum informatus*, or after writ of inquiry executed. See the cases collected 1. Com. Dig. 325, 326,

Barret against Cleydon.

(17) **MEMORANDUM**, That in last Term a judgment given in *C. B.* in *scire facias* upon a recognizance at the suit of *Barret* against *Cleydon* was reversed in *B. R.* because execution was awarded upon one *nihil* returned, when there ought to have been two *nibils*, and this by all the clerks of the said court. And so in *scire facias* to have a charter of pardon of outlawry allowed. But in *scire facias* upon a recovery of debt or damages against the party who was party and privy to the judgment, and not against his executor or administrator, one *nihil* suffices. And there was also another error assigned, *s.* because the *teste* of the *scire facias* was upon a Sunday, which is not (a) *dies juridicus* in the bench; for the *teste* was on the 28th day of *November*, which happened upon a Sunday in this year, and then the Term finished on the 29th day of *November*. NOTE for the practice in *B. R.* if any of the errors assigned are holden for no error, they are made void by a mark on the roll, which is a cross.

Salk. 599. pl. 4. Imp. K. B. 323. &c. 343. Imp. C. B. 393 398. 400. Cro. Jac. 496. 1. Com. Dig. 316. 318. 3. Burr. 1599.]

In *scire facias* upon a recognizance there must be two *nibils* returned; so to have a charter of pardon of outlawry allowed. But upon a judgment against defendant himself one *nihil* is sufficient, though there must be two against executors.

If a *sci. fa.* be tested on a Sunday, it is error.

Noy, 16. 12. H. 4. 5. b. 20. H. 7. 3. b. 48. E. 3. 1. b. 18. 22. H. 6. 17. 7. 48. Aff. 3. 2. 3. 14. H. 7. 3. a. 8. b. 10. & 16. 8. E. 4. 15. b. 5. 15. E. 4. 1. 7. 5. Co. 32. 14. H. 7. 19. b. 11. 14. H. 6. 51. 21. a. Dy. 172. 201. 1. Cro. 528. M. 1. & 2. El. fcl. 181. b. Plow. 265. 2. Cro. 65. 3. Cro. 605. Diet, 129. a. 1. Bullst. 11. [S in. 633. 2. Jac. 496. 1. Com. Dig.

(a) There is no difference between Sunday and any other day as to the return of a writ. Hen. Black. 9.

If the heir be in ward by reason of a tenure of an honour or manor, and not *in capite*, he shall not sue livery, but an *ouster le main cum exitibus de tempor. plenæ ætatis suæ*, although he never made tender.

Co. Inst. 77. 1. Ro. Ab. 504. Ley. Rep. 23. 3. Mar. 123. b. 7. H. 8. Cro. 177. pl. 7. 1. H. 7. 28. a. 32. H. 8. B.N.C. 99. 173. 189. Stamford. Prerog. 12, 13. N. B. 256. 28. H. 6. 11. b. Br. Livery, 14. 62. 26. Aff. 57. Br. Tenures. 94. Dy. 249.

(18) I N the court of wards was a case common to several,

s. One was in ward to the queen by reason of the tenure of an honour or manor, and not *in capite*, and this was found by office, and after he came to full age he remained a year or more without livery sued or tender made. Whether he shall have livery together with the issues from the time when he came to full age, or whether it should be a livery without issues, was much doubted there and among the Justices; but *ouster le main* it cannot be, as I conceive, where the land is holden in any manner of the queen except the duchy tenures of *Lancaster*. For by the note of the precedents in chancery of the time of *H. 6. Edw. 4. R. 3. in Lib. de Gill and Halley*, the *ouster le main* is always of land holden of some other than the king, for the words are these,

*s. de tali vero maner' in bal' tuâ quod de aliis quam de nobis ut permittit' tenetur, et quod post mortem ejusd' I. S. simil. capt' fuit in man. nostrâ si eâ occasione et non al' in manu nostrâ exist. manum nostram sine dilac' amoveas te inde ulter' in aliquo nullatenus intromitt' salvo jure nostro et alterius * cujuscunque exitus si quos inde à tempore mortis præfati I. S. perceperis, præfato W. S. liberes, ut justum est, teste &c.* And for the

lands in the duchy of *Lancaster* see 3. *H. 6.* in the livery by † *Fitzbugh*. And in 36. *H. 6.* livery by † *Dansey*, although they were holden of the king, an *ouster le main cum exitibus* was sued and granted as if the tenure had been of a common person. Note, this was in the time of *H. 6.* But afterwards, in the first year of *Ed. 4. † Conville* had livery with issues for lands holden of the duchy of *Lancaster*, and also by tenure of the duchy of *Cornwall*, and not *ouster le main*. For in 1. *Ed. 4.* the duchy was annexed to the crown, that is to say, given to king *Ed. 4.* and his heirs, kings of *England*, and then was dissevered again in the first year of *H. 7.* as it was in the time of *H. 6.* and then order was taken with the assent of the chief baron of the exchequer, and of the chief justice of the bench, that livery should be granted together with the issues from the time of full age by the name of *ouster le main*, because that was their course there for these three hundred years last past, as it is asserted, &c. [See 12. *Car. 2. c. 24.* by which all feudal tenures and their consequences were abolished.]

* [168. b.]

Plow. 209. 218, 219, 220.

Dy. 209. pl. 22. Co. Lat. 77. a.

Bronker's Case.

(19) **B**RONKER, sheriff of *Wiltshire*, was sued by information of perjury in the star-chamber at the suit of the queen for a false return of *Sir John Thynne* to be a knight of parliament for the said county, when in fact *Penruddocke* was chosen by the greater number of freeholders in the said county, in deceit of the country, and of the whole realm. And it appeared by examination *obiter*, that *Bronker* was not sworn to execute his office, although there was a *dedimus potestatem* directed to one *Hyde* to give him his oath, who dissuaded him from taking the oath on account of the difficulty of the articles. And this matter upon grave resolution, and in an honourable and very large assembly of the nobles was decreed against *Bronker*, that is to say, that for the contempt of the ancient law, s. that every sheriff at the beginning of his office should be sworn, he should pay for his fine to the queen one hundred pounds, besides being imprisoned for five weeks. And also one hundred pounds was adjudged to the queen according to the statute [8. H. 6. c. 7.] for the false return; and also an imprisonment for a year without bail or mainprize. And *Hyde* was fined at twenty marks, besides imprisonment for two weeks, &c. And also *Bronker* and *Penruddocke* were bound by recognizance to stand to the arbitration of four of the nobles for the one hundred pounds due to *Penruddocke*. But *Sir John Thynne* was bound to *Bronker* in three hundred pounds to save him harmless from his return, &c.

A sheriff fined in the star-chamber for not taking the oath of office at entering on his sheriffalty, and for making a false return of a knight of parliament.

If the commissioner who was to swear in the sheriff return the writ with the oath when it was not taken, he shall be fined.

Dier, 113, 114. Noy. 92. Latch. 232. 3. Keb. 389.

[Dalt. Off. Sheriff, 149. 15. Imp. Off. Sher. 42. 3. Lev. 116. Carth. 307. 232. Salk. 502. 504. 3. Com. Dig. 332, 333.]

23. H. 6. c. 14. Rast. Parliament, 16. Dy. 117. pl. 57. 10. Co. 100. b.

(20) **A** MAN took a distress of beasts in the county of *Wilts* in a place that is within the honour of *Wallingford*, the castle and court of which are within the county of *Berks*, and chased them * as far as to the castle, and there deliverance was made: and at the suit of the defendant the plaint was removed by *accedas ad curiam* directed to the sheriff of *Oxford* [qu. *Berks*.] into the bench; and there he counted of a taking in the place aforesaid in the county of *Wilts*; and this was good by the opinion of the Court. *East. Term*, 29. E. 3. [31. a.] and see *M. & 8. E. 3.* in a writ of right.

* [169. a.]

Distress taken in the honour of *W.* in one county, and driven to the castle of *W.* which is in another, and where the court of the honour is, the *accedas ad curiam* may be directed to the sheriff of the latter county, and plaintiff count of a taking in the first.

30. E. 3. 5. Distress, 16. 30. Aff. 38. Plow. 9. b. 1. H. 6. 3. 22. E. 4. 11.

[F.N.B. 204. note (e)]

In Cur' Ward.

Wilkes against Leufon.

Habund' eis et hered' suis in perpetuum, ad proprium opus et usum ipsorum A. B. et C. in perpetuum, without et heredum suorum, with warranty to them, their heirs and assigns, in form prædictâ, gives only an estate for life. The heir is estopped from falsifying the consideration acknowledged in the deed of feoffment of his ancestor.

Where a tenant in capite made a feoffment without consideration, but falsely alleged one in the deed on an office finding his dying seised, the master of the wards cannot remove the feoffees on examining into the consideration, and retain the land until &c. and though the heir tender, still if he do not prosecute his livery, the queen must admit the feoffees to the traverse, and to have the farm, &c.

2. Co. 75. 2. And. 81. 136. 199. 200. 1.

3. Co. 21. a.

1. H. 8. c. 10. Raft. Escheators, 12.

Dy. 377. pl. 29.
Stamf. Prerog. 68.

[See 12. Car. 2. c. 24.]

Plow. Manxel's case, 62. 4. Co. 76. a. 71. b. Dy. 72. 146. b. 191. 337. a. 2. (ro. 76. 1. Brown. 191. 1. Ro. Rep. 42. 30. H. 6. Devise, 22. 27. H. 8. 5. b. 1. Co. 87. b. Perk. 239. 557. Plow. 539. Bro. Estates, 78. B. N. C. 181. 406. Dy. 252.

(21) **WILKES**, who was merchant of the staple, who died in February last past, made a feoffment in the August before his death to one *Leufon*, a knight, and his brother, and another, of the manor of *Hodnel* in the county of *Warwick*; and the deed, (seen) for seven thousand pounds to him paid by the feoffees, of which sum he made acquittance in the same deed (although in fact and in truth not a halfpenny was paid), gave, granted, and confirmed &c. "*habendum eis et heredibus suis in perpetuum, ad proprium opus et usum ipsorum A. B. et C. in perpetuum,*" and not "*heredum suorum,*" together with a clause of warranty to them, their heirs and assigns, *in formâ prædictâ*: and notwithstanding this feoffment he occupied the land with sheep, and took other profits during his life; and afterwards his death was found on a *diem clausit extremum* by office, that he died seised of the said manor in fee, and one *I. Wilkes* his brother of full age found his next heir, and a tenure *in capite* found, and now within the three months the said feoffees sued in the court of wards to be admitted to their traverse, and also to have the manor in farm until &c. And although the said *I. Wilkes* the brother had tendered a livery, yet he had not hitherto prosecuted it, but for cause had discontinued. And Whether now the master of the wards at his discretion could remove the feoffees by injunction out of possession upon examination of the said consideration of the said feoffment which was false, and none such in truth, and retain it in the hands of the queen *donec et quousque* &c. was a great question. (22) And by the opinion of the learned counsel of that court he cannot do it, but the queen is bound in justice to give livery to him who is found heir by the office, or if he will not proceed with that, to grant to the tenderers the traverse, and to have the farm, &c. the request above-mentioned. And this by the statutes 34. E. 3. [c. 14.] and 36. E. 3. [c. 13.] and 8. H. 6. [c. 16.] and 3. H. 8. [c. 2.] notwithstanding the opinion of *BRIAN* and others in *Benstede's case*, Trin. 1. H. 7. [27. b. pl. 5.] *secundum novas additiones et reporta*. And note, that no averment can be allowed to the heir, that the said consideration was false against the deed and acknowledgment of his ancestor, for that

that would be to admit an inconvenience. † And note the limitation of the use above, for divers doubted whether the feoffees shall have a fee-simple in the use, because the use is not expressed, except only "to themselves (by their names) for ever;" but if those words had been wanting, it would have been clear enough that the consideration * of seven thousand pounds had been sufficient, &c. for the law intends a sufficient consideration by reason of the said sum; but when the use is expressed otherwise by the party himself, it is otherwise. And also the warranty in the deed was "*to them, their heirs, and assigns, in form aforesaid,*" which is a declaration of the intent of *Wilkes*, s. that the feoffees shall not have the use in fee-simple; and it may be that the use, during their three lives, is worth seven thousand pounds, and more, &c. And suppose that the feoffment had been "to have to them and their heirs to the proper use and behoof of them the feoffees for the term of their lives for ever for seven thousand pounds," would they have any other estate than for the term of their lives in the use? I believe not; and so in the other case.

[3. Term Rep. 475. 5.
Term Rep. 129. 7.
Bro. Parl. C. 70.]

Plow. 309. 171.
2. Cp. 74. a.

Co. 87. b. 100. b.
27. H. 8. 5. b.
Dier, 155.

[2. Bac. Ab. 495. 498.
Shep. Touch. 58. 109.
1. Wood's Conv. 265.
&c.]

† A rent *de novo* was granted to one and his heirs to have to him and his heirs to the use of him and his heirs during the life of S.; and by SERJEANT DODDERIDGE, because the intent of the grantor appears to pass only an estate for life, no more shall pass, to which opinion the Justices seemed to incline. *Davis's case* [Mo. 876.] *East. 7. Jac. C. B.* and there COKE and FOSTER said, that it shall be a special occupancy of the rent.

Hil. 37. El. B. R. A case was thus: Price made a jointure to his wife for life, and died; afterwards the wife married one Horfe, and she and Horfe made a feoffment of the jointure to I. S. in these words: "*Know that R. Horfe and his wife have given and granted unto I. S. one messuage called Tourjon, to have to the aforesaid I. S. his heirs and assigns, to the sole use of I. S. and his heirs for the term of the life of the said Katherine.*" And the doubt was, whether it was a forfeiture. And by WRAY and others, it is a forfeiture, because "*for the term of the life*" refers to the use only, and not to the estate and use. CLENCH withed to consider it. *Trin. 31. El. B. R.* between Price and Hoe, where it was the better opinion that it was a forfeiture. [Cro. El. 131. 1. Leon. 125. Owen, 64. And see 14. Vin. Ab. Tit. Grants, P. a. and the note there.]

Michaelmas Term.

1. and 2. Queen Elizabeth.

Sir Richard Crumwell's Case. .

The king grants a forest for years to A. who covenants to keep one hundred deer there, and to leave one hundred at the end of the term. A grantee in fee cannot kill or give warrant for any deer there during the term.

By the grant of a forest the game passes.

Jenk. Cent. 5. c. 63.

S. C.

Palm. 88.

2. Bulst. 290.

(1) **K**ING Henry 8. by letters patent dated in the 33d year of his reign of his own certain knowledge and mere motion gave, granted, and to farm delivered to *Richard Crumwell*, knight, "*his forests of Waybridge and Sapley in the county of Huntingdon, habendum to him with all its parts, members, parcels, and appurtenances, for the term of eighty years, paying six pounds thirteen shillings and four-pence by the year,*" &c. with this clause, s. "*and the aforesaid R. C. his executors, and assigns, shall keep, have, and maintain in the forests aforesaid from time to time during the term aforesaid one hundred deer, and the same, or others like them in number, in the said forests at the end of the term aforesaid shall leave to the said king, his heirs, and successors,*" without any other reservation of the game. And now *Lord North*, who had the fee-simple, would have taken of the game, or given a warrant there: and as it seemed to the greater part of the Judges and Serjeants of both houses, and to the Attorney General, he cannot, for all the game was included in the word and name of *forest*; and the one hundred deer are not reserved to be killed or any of them, for then it would not be possible for the lessee to perform his covenant above-mentioned, but it is reserved only for the maintenance of the game and forest.

[4. illt. 314.]

* [170. a.]

A *superfideas* does not lie upon a *mandamus post mortem*, or on a *dim clause extremum*, but the party grieved must traverse the office.

The escheator being commanded by the writ "*quod superfideas*" where it should be "*superfideas*" holden that it could not be amended.

* Lord Powis's Case.

(2) **I**N the court of wards it was moved as a great doubt as follows, that is to say, that where a writ of *mandamus post mortem* of *Lord Powis* was awarded to the escheator of the county of *Salop*, and by virtue thereof the escheator charged an inquest, and they were agreed upon their verdict, and delivered it on paper to the escheator, yet before the engrossing and sealing of it (which was agreed to be done at another

another place and day, &c. a writ of *superfedeas* came to the escheator at the suit of one *Harbert* and his wife, which writ recited (with an “*although we by our writ have commanded you that &c.*”) s. all the points of the former writ to the end of it, “*nevertheless for certain causes us thereunto especially moving, command you that from every execution of our aforesaid writ, or of any other writ thereof made or to be made, or from the taking of any inquisition by virtue of your office after the death of the said Lord Powis, of lands and tenements which were his, taken by you or to be taken, SUPERDEAS omnino,*” omitting the syllable *se* † in the word written at length *superfedeas*. And the opinion was, that the escheator would do best to make a return into chancery of the office, and also of the writ of *superfedeas*, in *hæc verba*, and also the special matter of the verdict given before the delivery as above, *et valeat quantum valere potest*: which was done accordingly. (3) And afterwards in Hilary Term it was again argued, &c. and it seems that no *superfedeas* will lie in this case, but the escheator may disobey it if he will, because it is the suit of the heir to have his land, and no other ordinary means has he after a year and a day, any more than in a *diem clausit extremum* (a). And by 4. H. 7. [16. b.] in the case of the office *post mortem Lord Dacres*, it is said by FAIRFAX, that it was adjudged in the time of R. Newton that no *superfedeas* lies on a *diem clausit extremum*. And also *long quinto Ed.* 4. fol. 132. agrees, where it is said that neither by great seal nor by petit seal, when it is the suit of the party, shall a *superfedeas* be allowed. Also it seems, *primâ facie*, that the writ of *superfedeas* comes too late, because the escheator had fully executed the writ in all points, when he had the verdict in paper, and in that place the style of the inquisition shall be made where the verdict was given, and not where the jurors seal, if it be at another place. And the return of the writ is no part of the execution of the writ, for upon a return of *mandavi ballivo libertatis cui executio istius brevis totaliter pertinet faciendâ*, the sheriff shall make the return of the writ, and the bailiff

An office found by the inquest, though pur on paper, is not complete till indented, ingrossed, and sealed.

Jenk. Cent. 5. c. 64. S.C.

F. N. B. 253. b.

2. R. 3. 13.

5. Co. 46.

5. Co. 121.

No such *superfedeas* is in the Register in print among the writs of *superfedeas* there, wherefore, &c. And in F. N. B. 253. if the writ of *diem clausit extremum* be left or taken from the suitor by force, he shall not have feveral.

Stamf. 52. Cro. Superfedeas, 25.

2. H. 7. 19. 12. Dier, 67.

† Orig. &c.

(a) As these writs issued only on the death of the king's tenant *in capite*, they of course became obsolete when by 12. Car. 2. c. 24. all tenures were altered to common socage.

11. H. 8. Cro. 201.

Rdft. Escheators, 2.

* [170. b.]

Rdft. Escheators, 4.

Rdft. Escheators, 11.

4. Co. 74. 1. H. 8.
c. 8.Office devant Eschea-
tors, Bro. 18.

Bro. Amendment, 18.

5. Co. 46. 129.

2. R. 3. 13.

[Vin. Ab. Amendment,
(A. 2.) Com. Dig. A-
mendment, (D.) and of
writs amended for cler-
ical errors, see 1.
Black. 462. 2. Black.
836. Cowp. 425. 1.
Term Rep. 782. 3.
Term Rep. 659.
Term Rep. 457. 1. Hen.
Bl. 291. 541.]

[Imp. Off. of Sheriff,
504.]

Bro. Diffusion, 11.

the execution. And note, in the *superfedeas* the escheator is not restrained from making a return, but from such inquisition as he shall have taken *virtute officii*, and that is none, for the above inquisition was taken *virtute brevis*, &c. Yet see the statute 34. E. 3. c. 13. which is, that each escheator shall take his * inquests of his office by good men, &c. and that the inquests of taken be indented between the escheator and the jurors, &c. And in statute 36. E. 3. c. 13. he shall take such inquests by good men, &c. by indentures made as in the other statute. (4) And also in the statute 3. H. 8. c. 2. if any escheator take any inquisition or office of lands not found nor presented by the oaths of twelve men, and indented, and by them sealed, &c. then a forfeiture of one hundred pounds, and the rest of the same statute which charges the escheator to deliver the counter-panel of the office or inquisition indented and sealed, &c. by which words it seems that the verdict ought to be given, engrossed, indented, and sealed by the jurors. But *quære* if the first statute shall be intended of offices or inquisitions taken *virtute brevis* or *virtute officii*, by reason of these words "*of his Office*;" and to this point I have seen in a book of Mr. Gyll, bound in black leather, marked in this manner, viz. *Indorsatur supra officium post mortem Dragonis Barantine ex officio Escætoris capto in anno 4. reg. H. 5. sic. MEMORANDUM, quod ista inquisitio adjudicata fuit pro nullâ et vacuâ pro eo quod eadem inquisitio non fuit capta per indenturam inter escheatores et juratores in inquisitione prædictâ nominat' juxta formam statuti de inquisitionibus per escheatores ex officio suo capiendis ann. regni domini Ed. nuper regis Angl' proavi dicti regis H. 5. 34. editi.* And afterwards the resolution was by the Judges, 5. DYER, SAUNDERS, WHYDDON, BROWNE, A. RASTAL, and WESTON, that the *superfedeas* does not lie in this case; and also that the writ shall not be amended: but for the verdict they thought, that before the ingrossing, indenting, and sealing, it is not a verdict, and so the *superfedeas* came time enough if it lay in the case. But CATLYN, Chief Justice, was against the opinion in the first two points, but as to the sealing and indenting he agreed with the others. And at length, at the end of the Term, the inquisition was received and allowed, and the party that had the *superfedeas* driven to his traverse.

Pelles *against* Saunderfon in B. R.

(5) THE farmer of a rectory sued one of his parish in the ecclesiastical court for tithes of *wheat* and *rye* growing in sixty acres of land, and the defendant † *sued* a prohibition upon the statute 2. and 3. E. 6. [c. 13.] suggesting that all the sixty acres were barren heath and waste grounds, and by reason of the barrenness have not been charged within time of memory with any tithes until the plaintiff had improved thirty acres of it, and converted it to tillage, &c. so that by the intendment of a proviso in the said statute (although by express words such ground is not discharged of tithes for seven years after the improvement) he ought to pay no tithes within seven years, &c. and proved that suggestion within the six months by witnesses according to the act. And upon the attachment the parties appeared, and the defendant in it * defended the contempt, &c. but he took no traverse to it; for it is not the practice in B. R. as it is said; and pleaded that the said sixty acres were fruitful, and not barren, as the plaintiff supposed, and upon this joined issue with the plaintiff; and it was found by verdict, that as for thirty of the said acres they were barren, as the plaintiff had suggested; and as to the residue they found that it had paid tithes of *wool* and *lambs* at all times,

On a prohibition to a suit for tithes of *wheat*, the land being suggested to be lately improved, was proved so, but that tithes of *wool* and *lambs* had been always paid for it: though by the statute the same tithes continue payable for seven years, the parson cannot have a consultation, for he has not sued for tithes of these.

Jenk. Cent. 5. c. 65. S. C. M. 21. 22. Eliz. Rot. 311.

Hob. 192. 301. Co. Mag. Char. 655. Dy. 349. pl. 16.

* [171. a.]

Noy, 13. Plow. 264. Plow. 469. R. 780.

Noy, 131. 18. El. 349. b.

(5) Fens or marsh grounds which are drained shall pay tithes in 67 [7] years, and not sooner, 2. E. 6. c. 13. *Trin.* 38. El. B. R.

Hil. 5. Car. C. B. † *Scone's* case. It was resolved that tithes are due and payable of all mills, unless they be as ancient as 9. E. 2. and before; for mills more ancient are discharged of tithes by the stat. *Ari. Cler.* [c. 5.]

Hil. 5. Car. C. B. † Between *Pain* and *Evans*, a prohibition was awarded to the bishop of S. Asaph, where it was awarded that tithes shall not be paid of ancient mills, 1. before the time 9. E. 2. and there also it was holden by the Court, that if such ancient mill fall, and be rebuilt upon the ancient foundation, the discharge of tithes shall hold good and revive.

East. 10. Car. SERJEANT HITCHAM moved, that before the statute de clero no tithes at all were payable for mills, but the said statute was *lex inde creativa*. But per Cur' it was adjudged that the common tradition, that no tithes are due of ancient mills, is to be understood of very ancient mills, 1. before 9. E. 2. only; for after that, and before memory of our ancestors, they ought to pay tithes. Bro. [Prohibition] The case of *Tanner* and *Kirkham*, in [Coke's] New Book of Entries, 463.

Barren ground is understood by the opinion and judgment of the common law, to be whereof no profit ariseth or groweth; and that ground which hath been stubbed, and after beareth corn or grass, is not barren. Waste ground is understood such ground as no man doth challenge as his own, or no man can tell to whom it certainly belongeth, and lieth uninclosed and unbanded with hedge and ditch; but the ground that lieth inclosed and hedged and ditched in, and the land known, is no waste ground. *Quo. nota per Curiam.* Heath ground is understood that ground that is dispersed, and lieth at common. Bendlote [80. pl. 122.]

East. 41. Eliz. A. sued in the court christian for tithes of pigeons, and other tithes, and had sentence, although the defendant had tendered one single witness of the payment of tithes of pigeons; and upon this suggestion a prohibition was awarded, and afterwards a consultation for the residue; with exception that they in the court christian should not proceed to give costs for the pigeons.

Yelv. 127.

Stavely and Ukhorne,
Mich. 1653. fol. 93. b.

&c. (6) And by the opinion of the Judges of both benches (except WHYDDON), the party who sued in the spiritual court shall have a consultation for the said residue: to which SAUNDERS *Chief Baron*, agreed. Note, the above statute was mistaken, for the parliament was supposed to commence on the 4th day of *November*, in the 2d year of *E. 6.* which was false, for it was a session by prorogation. And yet afterwards, upon better advisement and examination of the verdict, which in the premises of it is found for the plaintiff in the prohibition, s. that it was barren, as the plaintiff had supposed, and that it was so barren, that on account of the barrenness thereof none had paid tithes, although afterwards they find that for thirty acres they had paid *wool* and *lambs*. And because by another proviso in the same act, such tithes as were paid before shall be paid within the seven years after the improvement, &c. and not any tithes of other nature; and because the libel was not for other tithes in the said sixty acres, but only for *wheat* and *rye*, the party could not have a consultation, but was told that he might commence a new suit in the court christian for tithes of *wool* and *lambs* in the thirty acres not improved.

2. Inst. 655. b.

[Cro. Eliz. 306. 736.
2. Term Rep. 427.][4. Com. Dig. 515. 517.
4. Bac. Ab. 246]

(6) *Mich. 42. 43. Eliz. Rot. 227. B. R. Webb v. Beal* [Cro. Eliz. 819.]. Upon prohibition the plaintiff suggested that he had been used from time whereof &c. to pay three shillings and four-pence for all great and *† small tithes* except corn growing upon seventy acres of land, and made his proof by two witnesses according to the statute; but they testified that the course was to pay four shillings, and by the Judges a prohibition was awarded; for although he has failed in the proof of his prescription, yet so much is proved, that the spiritual court has no cause to proceed for tithes in kind. DODDERIDGE said, that *Mich. 34. and 35. El. † Bird and Collingworth*, in a like case a consultation was awarded. POPHAM answered that the opinion of the Judges of *C. B.* is now to the contrary, for when a *modus decimandi* in one sort is suggested and another proved, we ought not to award a consultation to give them authority to sue for tithes in kind, but to sue for tithes in such kind as is proved.

† The original is *niconi*, perhaps for *nient*, (less,) by mistake.

Replevin in Kent.

Devise to *F.* and the *heirs male of his body*, and if he chance to die *without heirs of his body*, remainder over, gives only an estate in special tail male.

[Bendl. 68.]

1. And. 8. Mo. } S. C.
23. 611.

Turke against Frencham.

(7) CLEMENT Frencham seised of lands in fee holden in socage by his last will in writing devised it to his wife during her life, remainder to one Clement Frencham his cousin, and to the heirs male of his body begotten, and if it should happen that the said Clement his cousin should die without heirs of his body lawfully begotten (without saying "male" or

(7) *Hil. 17. Eliz. A.* devised lands to *B.* and his heirs male, and that if he died without heir of his body then it should remain to *E.* in fee, and died; and adjudged that *B.* has only a special tail to him and his heirs male. [1. Eq. Ab. 197. 8. Vin. 272. 2. Bac. 68. 3. Com. Dig. 30. See Cowp. 234. 308. 410. Doug. 321.]

"such

"such heir", or any thing of that sort), remainder to one *Alexander Frencham* his cousin, and to his heirs male in fee-simple, "and for lack of heirs male, to remain to the next heirs male begotten of that kind and stock of his body lawfully begotten." And the first in remainder had issue a daughter, and died without heir male of his body. The doubt was, whether his daughter should have the land by the general words after the "if it should happen" above mentioned. And by the opinion of all the Court that makes no general tail to the said *Clement*, only to the heirs male &c. for the intent of the devijor appears expressly by his subsequent words: and so it was adjudged without arguing the demurrer.

2. Keb. 195. East. 4. and 5. Ph. and M. Rot. 922 accord'. Bendl. 2. Cro. 656. 2. Ro. Rep. 156. 218. 3. Mar. 122. a. 13. H. 7. 17. b. 16. El. 333. b. 5. H. 4. 4. a. 9. Co. 128. a. Bro. Tayle, 12. Goulsh. 135. Pal. 131. 2. Bul. 129. Plow. 414. 376. 3. Cro. 16. 27. H. 8. 27. a. 1. Inst. 21. a. 1. Bulf. 223. Post. 331. a. But it seems otherwise, if it had been by the subsequent remainders which had been general in tail.

* [171. b.]

Hil. 1. Rot. 131.

Avowry for taking beasts in *N.* in a common field under demise from *B.* of the locus in quo, containing three hundred acres, Bar. that before *B.* had any thing in the locus in quo, the archbishop of *Y.* was seised in fee of the site or the manor of *N.* whereof the said three hundred acres are parcel, and demised by indenture duly confirmed (both which deeds remain of record in chancery) to *A. B.* for years *que state* &c. And bad,

1st, Because it neither confesses and avoids, nor traverses.

2d, Because the seisin is alleged of the site &c. whereof the three hundred &c. are parcel: and also it is supposed common field.

3d, Because no *proferet*. 4th, Because it is a *que estate* of a term, and plaintiff does not shew how he came to it.

Dy. 167.

29. Af. 55. Plow. 39. 26. H. 6. Que Estate, 6.

* (8) **A** TAKING of beasts is supposed at *Northcerney* in a certain place called the common field, otherwise the common down: the defendant says that the place in which &c. contains in itself by estimation three hundred acres of pasture, &c. whereof before the said time one *W. Partridge* was seised in fee, and demised in the 4th and 5th year of *Philip and Mary* to the defendant for the term of twenty years, &c. and avows for *damage feasant*; to which the plaintiff says, that long before the said time of the taking, and before the said *W. Partridge* had any thing in the said three hundred acres of pasture, in which &c. one *E.* late archbishop of *York*, was seised of the site of the manor of *Northcerney* with the appurtenances, whereof the said three hundred acres of pasture, &c. are and at the time of the taking were parcel in his demesne as of fee in right of his said archbishoprick, and being so seised before the taking &c. to wit in the 32d year of *H. 8.* by indenture, one part whereof was sealed with the seal of the said archbishop, and now remains of record in the court of chancery, demised the site of the said manor with the appurtenances whereof &c. among other things by the name &c. to one *A. B.* for the term of fifty-one years, &c. which lease was confirmed by the dean and chapter by their writing in like manner remaining of record in the said chancery, without saying "which he bring here into court;" by virtue of which *A. B.* was possessed &c. whose estate and interest the said plaintiff hath, and at the time of the taking had (without saying how); wherefore he entered, and was possessed, and put the beasts

3. Cro. 650.

[Cro. Eliz. 30. 5. Com. Dg. 111, 112.]

5. H. 7. 12. b. 14.
H. 6. 24. 2. E. 6. B.
N. C. 384. 407.14. H. 6. 6. a.
Dy. 59.6. Co. 25. 3. H. 6. 31.
1. Saund. 23.7. 25. E. 3. 7. 40. 38.
Ayl. 28. 4. Mar. 159.
b. 12. H. 4. 41. a.
7. H. 5. 7. 19. H. 6.
6. 15. E. 4. 16. 1.
H. 7. 29. Dy. 29. b.

* [172. a]

[Bul. Ni. Pr. 250 &c.
1. Bac. Ab. 507. 3.
Com. Dig. 400.]6. Co. 38. Perk. 64.
4. 5. H. 7. 9. 39. 3. 6.
17. E. 4. 126. b. B. N.
C. 440. 2. 11. 30. H. 6.
10. b. 7. a. 7. El. 238.
b. 7. E. 6. Fro. Que.
Estate, 31. Fitz. Que.
Estate, 3. 2. 18. 4. 26.
10. Plow. 56. See
1. Inst. 121. a.
[5. Com. Dg. 80. 81.
Skinner, 303.]

Trin. 36. Eliz. C. B. Rot. 134. In an *ejectione firme* by Giffe against *Tburston* [Owen, 16.] exception was taken to the pleading, because the defendant had pleaded a *que estate* of the lessee of the abbot without shewing how he came to his estate. *Cur.* "That is a good exception, for he shall be compelled to shew how he came to his estate of the term, inasmuch as that cannot be but by legal means, *contra* of freehold."

(a) By 4. and 5. *Ann. c. 16.* the want of a *profer* is aided on a general demurrer.

Rat-

Ratcliffe's Case.

(10) ONE was outlawed after judgment in debt, and then came *gratis* and surrendered himself in *C. B.* where he was condemned and was committed to the Fleet (as he ought to be, but yet it is not usual); and there he sued out a *certiorari* directed to the Chief Justice of the bench to remove the tenor of the record of outlawry into chancery, and also to certify the truth of his surrender, and being in prison; which was certified accordingly, without saying any thing, whether the plaintiff was satisfied or not: and upon this he had his pardon *ita quod stet rectus in curia &c.* where it should be *ita quod satisfaceret querenti*, by the precedent in the Book of Entries of Mr. *Jener*, fol. 19. And upon this he sued out two writs of *scire facias* against the plaintiff, and upon two *nibils* being returned, the pardon was allowed and the party dismissed of the outlawry, when in fact he had made no satisfaction to the plaintiff. *Quere* what remedy is there for him? (11) And see statute 5. *Ed. 3. c. 12.* which is, where the defendant in trespass for the king's fine, and at the suit of the king is outlawed, he shall not have a charter of pardon until the chancellor be certified of the satisfaction of the damage to the plaintiff: but the statute says nothing of outlawry after judgment in other actions, but only where the outlawry is upon process before appearance, and in that case no charter shall be granted until it appear to the chancellor by certificate &c. that the person outlawed has rendered himself to prison in the court out of which the *exigent* issued, and he shall not be delivered until the plaintiff be warned and the warning witnessed to make the plaintiff plead upon the original if he choose &c. And yet notwithstanding these

The chancellor not being certified whether one outlawed after judgment in debt had satisfied the plaintiff or not, issued his pardon *ita quod stet rectus in curia*, where it should be *ita quod satisfaceret querenti*; and though in fact plaintiff was not satisfied, on two *scire facias* and two *nibils* returned the pardon was allowed.

1. H. 7. 20. 30. Aff. 20.
4. & 5. P. & M. Rot.
438. 40. E. 3. 2. b. Rast.
Exigent et Outlawry 1, 2.

[22. Vin. Ab. 373.]

Dier, 168. a. [pl. 17. q. vide] 7. H. 6. b. 42.
Aff. 16.

(11) 5. *Car. C. B.* in the case of one *ϕ Mullineux*, RICHARDSON, C. J. said to the Court, that a *certiorari* came to him out of chancery to certify the tenor of a record of outlawry to have a charter of pardon. The clerk of the outlawries engrossed it, and indorsed that the party surrendered himself to prison, the outlawry being before judgment, when in reality he never appeared or surrendered himself; and the party at whole suit he was outlawed complained of this to the C. J. who upon examination of the clerks and prothonotaries found that upon all outlawries the clerks of course enter upon the roll that the party outlawed surrendered himself, and so they are always certified, although it be false. And this practice was allowed by the Court; but to satisfy the statute 5. *E. 3. [c. 12.]* and for the benefit of the party who sues, they ordered that there shall be no *scire facias* on such pardon, until the party who sues the pardon has appeared to the action of the party, and this order was commanded to be observed and entered in every office of the court. And the reason of the entry of course, that he had surrendered himself, where he does not, is for the ease of the subject, because it would be a great inconvenience that subjects in the remote parts of the kingdom being outlawed, could not have a pardon without making a personal appearance in court. See 1. *E. 5. 1. b.*

5. E. 4. 1. 1. E. 5. 1. b.
 Dy. 198. Charter, 28.
 20. 5. Co. 89. 13. H. 4.
 Scire Facias 150. 9. H. 4.
 Scire Facias 144. Fitz.
 N. B. 247. G.

words of the statute, two *nibils* in *scire facias* have always countervailed a *scire feci*. But it appears by FITZHERBERT, title *Charter*, chapter the last, s. 13. H. 4. that after condemnation in debt if the defendant be outlawed, he shall not have the charter granted until the chancellor be apprized that the plaintiff is satisfied: and the form of pardons of outlawries after judgment is, *that the plaintiff is satisfied, or, that upon due process before the Justices had, it is considered that the said defendant should go quit against the said plaintiff &c.* and no clause of *ita quod stet rest' &c.* for this clause is in the pardon of outlawry before judgment, where he is in a situation to *make answer to the plaintiff. See in the *Register* thereof, fol. 288. and in the above case *Ratcliffe* was let to mainprise by recognizance to appear from day to day as long as the Court &c. on account of the difficulty of the case, *Curia advisare voluit*. And after the year and the day the plaintiff sued out a *scire facias* against the same defendant, and had execution by default, and a *capias ad satisfaciendum* awarded, upon which process he was outlawed, and upon the *capias utlagatum* he came in. Whether he shall avoid the outlawry by plea without a writ of error or not, *quære bene*.

* [172. b.]

3. 4. 7. H. 4. 5. 2. & 10.
 1. a. & 5. Plow. 166.
 30. 33. 39. H. 6. 2. b.
 1. b. 1. b. Dy. 174.
 192. b. 206. a. 9. 10.
 11. 12. H. 6. 8. 2. 4. b.
 157. 15. H. 6. Error,
 23. 19. H. 6. 12. 44. 2.
 58. do.

Lane's Case.

Where tenant by knight service of a manor held over of the king in *capite* levied a fine *sur grant et render* to himself for life, remainder to his wife for life, remainder to his own right heirs; on his death, resolved that the king was entitled to the wardship of his son, and the third part of the manor; for though the wife be in by the conveyance, yet it is the disposition of the husband for the advancement of the wife within 32. H. 8. c. 1. §. 4.

[See] 2. Co. 76. b. 9. 127. a.

4. H. 6. 20. Dy. 8. 199. 2. 259. b.

(12) JOHN LANE seised in fee of the manor of *Walgrave* in the county of *N.* and holden of the younger *Compton*, who was in ward to king *Edward* and yet within age, as of his manor of *Yardley Hastings* in the said county by knight-service, in *Trinity Term* 33. H. 8. levied a fine of the said manor of *W.* to one *Digman*, *sur consueance de droit come ceo que &c.* and by render took back an estate to himself for term of life, remainder to his wife for the term of her life, remainder to the right heirs of the husband, and no office was found in the county of *N.* to entitle king *E.* to the manor of *Yardley*, but in another county a tenure in *capite* was found; and upon this only the manor was seised into his hands; which manor of *Yardley* king *Edward* in the 7th year of his reign granted to the earl of *Pembroke* *durante minoritate* of the said *Compton* (except all woods, wards, and marriages). After which grant *I. Lane* died, having issue two

sons

sons both within age; the wife surviving entered into the manor of *W.* and afterwards the eldest son died, the youngest being yet under age: Whether the queen shall have the ward, and Whether she shall have the third part of the manor of *W.* of the wife or not? (13) The statute of 32. *H.* 8. [c. 1. §. 17.] speaks of jointenancy of lands holden of the king, and the fee-simple in one of them, who being dead his heir shall be in ward notwithstanding the survivor: and this case is not so. Also the youngest son was not heir to the father at the time of his death &c. Also no office being found, the grant to my Lord *P.* was void. But admitting it to be good, whether the exceptions above which are incidents and perquisites, or casualties of the signiory, are good or void, or shall be taken as a covenant &c. Also whether upon this fine *sur grant et render* of *Digman*, who had a fee-simple for the time, shall be taken within the statute as a disposition of her husband for her advancement, And at length the case was ruled for the queen (*a*).

1. Keb. 10.
B. N. C. 394. 40. E. 3.
9. b. Dy. 252.

2. Jac. Cro. 40. Rast.
Wills 2. 28. H. 8. 10. a.
7. El. 233. a. 9. Co. 126,
127. 32. H. 8. Bro.
Gard. 100. Stamf. p. 54.
Plow. 229, 230. 464.
26. Aff. 53. 4. Mar.
195. b. Bro. Patents,
47 49. 74. 18. H. 6. c. 6.
Rast. Escheators, 7. 5.
E. 6. Bro. Office de-
vant &c. 55. 10. H. 4.
3. 29. Aff. 20. Dy. 91. a.
132. b. 146. a. 2. El.
181. a. 288. 2. Co. 76. b.

(*a*) But now by 12. *Car.* 2. c. 24. all tenures by knight service of the king or of any other person, and by knight service *in capite* and by socage *in capite* of the king, and the fruits and consequences thereof, are

taken away and discharged. And all tenures of honors, manors, &c. held either of the king or any other person are turned into free and common socage. 3. *Com. Dig.* 513.

Lord St. John of Bletso *against* Francis Saunders.

(14) **A** *PLURIES replegiare* was sued in the county of *N.* for one cow with calf, returnable last Term in *C. B.* to which writ the sheriff returned, that he could not make replevin because the defendant claimed property; upon which return the writ *de proprietate probanda* issued out of the * bench to the said sheriff, *assumptis secum custodibus placitorum coronæ* &c. commanding him to make deliverance to the plaintiff if it be found for him: and that then also if he found pledges to prosecute, he should attach the defendant to answer as well the lord the king for the contempt as the plaintiff for the damages &c. returnable on the Octave of *Saint Michael* this Term; and the fact was, that the property was found for the defendant, and against the plaintiff; and the sheriff offered to the Court to make a return of this; and the plaintiff would not have it &c. And it was much doubted whether

To a *pluries replegiare* returnable in *C. B.* the sheriff returned a claim of property, and the *proprietary probanda* issued out of that court.

* [173. a.]

[See] Co. Inst. fo. 145. & Fitz. N. B. 77. c. [in note to Edit. 1755.]

30. E. 3. 30. F. Proprietary probanda 3. 7. H. 4. 45. 28. 8. Co. 60. Dy. 189.

Nota Co. Lit. pl. 219.
fol. 145. b. Bro. Proprietie, 12. 13. 49. 31.
H.6. Propriet Proband.
5. 31. E. 3. Propriet.
Proband. 4.

[Gilb. Replev. 98. 4.
Bac. Ab. 381.]

whether this writ *de proprietate probandâ* was well awarded out of *C. B.* or not, for few or no precedents could be found of it, but in *B. R.* it is otherwise, of which see a good case 1. *E.* 4. fol. 9. where the property was found for the defendant as above; and what more should be done thereon *quare* well. But the *proprietate probandâ* which is in the *Register* [fol. 83. a.] is an original, and issuing always out of chancery: and this is to be understood, I believe, where the sheriff upon the *alias replegiare* (which has these words, *vel causam nobis significes quare mandatum nostrum inde alias tibi directum exequi noluisse, vel non potuisti &c.*) returns into chancery that the defendant claims property, wherefore he cannot replevy.

Hil. 2. H. 6. Rot. 433. Curia advisatur, where the property is found for the defendant.

Barham against Hayman, in Attaint.

After entry on the lessee at will, he continued possession: Whether the lessor's accepting future rent waives the disseisin, and he shall still be tenant by sufferance, *qu.* In attaint the jury may give a special verdict.

Mo. 24. 1. Ro. Ab. 559.
Harpér's Rep. 98.

(15) ONE is tenant at will and sufferance of certain lands for which he has paid rent continually, and is discharged by his lord, and an entry made upon him by the servant of the lord, and by his command; and notwithstanding this he continued the occupation of the lands, and sowed them, and afterwards paid the accustomed rent at the day of payment, *s.* at the Feast of the Annunciation, and afterwards in harvest he severed the emblements, and made them in shocks

(15) *East. 5. Jac. C. B.* it was agreed by four Judges, that where the predecessor of the bishop of *Gloucester* made a voidable lease and the present bishop commanded his bailiff to receive his rent, and he paid it over to the bishop, the lease is now made good. The case was between the bishop of *Gloucester* and *Danby*. Note the execution, 245, or 247. *Harper's Rep. 3. Eliz.* this case is reported, whereby it appears that in an action of trespass by lessees against lessor for taking corn, the defendant pleaded not guilty, and the jury found against the lessor; upon which the lessor brought attaint; and it was adjudged that the jurors had given a false oath; for after the discharge of the lessee he is a disseisor, and when the disseisor entered, he had the corn severed, and the acceptance of the rent does not aid in this case, by *DYER*, for no rent was to be paid.

Turner's Rep. 122. ruled that he may take away the emblements, for by his continuance &c. *East. 6. Jac.* between *Mulmenx* and *Mulvers*, [2. *D'Anvers' Ab. 629. pl. 6.*] upon evidence to the jury it was agreed, if the disseisor pay the rent, the disseisin is purged, and it makes him tenant at will: and it was so agreed in *Egerton* the Lord Chancellor's case, who brought assize against *Sir Edward Kinaston*, who before had paid him the rent; and it was adjudged against the Chancellor, as *ROB. GODFREY* of counsel in the case told me: and so it was adjudged in *St. pruit's* case, [1. *And. 134.*] A father tenant at will died, his son entered and paid the rent, this purged the disseisin. 24. *Eliz. Norfolk* assizes, by *SERJEANT ANDERSON*, That if a man lease at will and discharge the lessee, this is a determination of the will *without* any actual entry; and the lessee continues, he is a tenant upon sufferance and not a disseisor. *Aliter* if the lessor had entered, or his servant by his command.

† Orig. fur.

upon

upon the same land; and the owner of the land commanded his bailiff to take and carry away the corn, and he did so: in whom the property of the corn was at the time of the taking, was the issue between the farmer at sufferance and the lord. And the Court thought that if the disseisor sowed the land, and severed it and left it lying upon the land, and the disseesee commanded his servant to take it away, that the disseesee shall have it as his own; for immediately by the entry it was remitted to the master, and no other entry is necessary. But it seemed to some that the continuance of the tenant at sufferance above and the acceptance of the rent at the day, prove that the owner never took it for a disseisin: but by the advice of the Court the jury found all the special matter above, except that they said, that notwithstanding the said entry and discharge, the tenant at sufferance continued his occupation as above, and paid the rent to one who was reeve of the manor of *Yalding*, which rent indeed was in gross among other rents paid to the *Lord Abergavenny &c.* and concluded with a *Whether the twelve jurors of the first inquisition upon the whole matter * aforesaid in form aforesaid found, gave a true and legal oath or a false one, they pray the discretion and advice of the Justices &c.* And in *Hil. Term* 3. *Queen Eliz.* *Cur' ult' advis' vol.* See in attain, the jurors demanded whether they may give their verdict specially as in affize, and the Judges said that they could not, without saying more. And afterwards, *s. in Trin. Term*, in the third year of *Queen Eliz.* by the opinion of the Court, the special verdict above was holden good, and judgment thereupon given according to the statute 23. *H. 8.* [c. 3.]

[Co. Lit. 55. b. *Mt. Hargrave's note* (11).]

But he would have them although they were carried away.

Co. 11. 51. b. *ibid.* 28. *H. 8.* 31. b. 2. *H. 7.* 1. b. 40. E. 3. 5. 5. *H. 7.* 16. 32. *H. 7.* 25. 12. 14. 35. E. 4. 5, 6. 31. 27. 37. *H. 6.* 1. 7. *Perk.* 100. *contr.* 32. *H. 6.* 7. a. *Dy.* 62. a. 154. 141. 178. a. *Co. Lit.* 271. a. 9. *Co.* 14. 21. *H. 7.* 38. *Dy.* 134. [Bull. Ni. Pr. 96. *Cowp.* 243. 1482. *Dougl.* 53. and see of disseisins generally, 1. *Burr.* 130 &c.] [2. *Bl. Com.* 150. 'Co. Lit. 270. b. *note* 1.] 41. E. 3. 26. b. *Dy.* 234. 302. 14. *H. 8.* 12. a. 3. *Co.* 64. b. 2. *R.* 2. Att. 8. *Dr. et Stu.* 138.

* [173. b.]

7. E. 4. 29. a. 9. *Co.* 14. *Raff.* *Attain.* 15. *Plow.* 93. a.

[5. *Com. Dig.* 157. *Bac. Ab.* *Verdict.* (D.) 2. *Hawk.* P. C. 623.]

Kirke against Sir John Parrat, Knight.

(16) ONE Kirke by the name of *I. Kirke*, otherwise called *I. Kirke citizen and fadler of London*, formerly brought debt against *Sir I. Parrat*, knight; and recovered upon a *non sum informatus*; and after the year, the plaintiff brought a *scire facias*, and had execution by default, and a *capias ad satisfaciendum* was awarded, and upon that an *exigent*, upon which he was outlawed; and in last *Michaelmas Term* *Parrat* brought a writ of error, as well in the record and process and rendition of the judgment as in the procla-

One outlawed on a judgment in debt brought error; in the original he had the addition of *fadler*, but in the *sci. fa.* for execution and in the writ of error *falter*: on this variance he must bring a new writ, for there is no such original.

The writ of error was directed to one Chief

mation

Justice, and the record certified by a new one: this too is bad, for he had no warrant to remove the record.

On a new writ to the new Chief Justice, he returned the *scire facias* and the subsequent process only, and *nul tiel record* to the rest.

30. H. 6. 2. Dy. 51. 2.

Bulst. 168. 174. 2. Cro.

342. Dy. 172. 5. H. 5.

7. 1.E. 3. 25. Lit. Rep.

56. 1. Rcl. Abr. 753.

4.

Faux Judgment, 13. 9.

H. 6. 42.

3. Co. 2.

[2. Bac. Ab. 201. 5.
Com. Dig. 298.]

Dy. 86. 177. 2. 206.

356. Plow. 550.

mation of the outlawry, directed to ANTHONY BROWNE, by name, then *Chief Justice* of the bench; and the writ was, that the suit was between *I. Kirke*, otherwise called *I. K. citizen and Salter of London*, when in truth the original was *Sadler*, and the *scire facias* and all the process upon it was *Salter*: and before the return of this writ ANTHONY BROWNE was removed from his place, and I, JAMES DYER, appointed *Chief Justice* in his stead: and without my knowledge the clerk of the treasury certified all the record of the plea as above, and the record also of the *scire facias*, and of the *capias* and *exigent* as above, in my name into the king's bench by the said writ of error. And it was much doubted there among the Judges, whether they could proceed to the errors upon this record and writ; and by the opinion of the Judges, the sure way is to purchase a new writ of error directed to me now, and to name *Kirke* by the addition of *Sadler* and not *Salter*, according to the truth of the first original; for they thought that the record was never removed from *C. B.* into *B. R.* by the said writ of error, partly because it was removed without warrant for the cause aforesaid, and partly because there was no such original of the plaint by the addition of *Salter (a)*. And at length by the opinion of the said Judges a return of a new writ directed to me was made as follows: (17) "The record and plea of a certain writ of *scire facias*, "together with the process of proclamation and the return "of outlawry between *Rob. Kirke*, otherwise called *Rob. Kirke*, citizen and † *Sadler of London*, and *John Parrat*, "late of *London*, knight, otherwise called *Sir John Parrat*, "knight, as well of a debt of thirty-nine pounds eight shillings and ninepence, as of thirty shillings for his damages "adjudged to the said *Robert* by reason of the detention of "the said debt annexed to this writ, I return to our lady * "the queen: and I further certify to the said lady the queen, "that there is no record, process, or judgment of any plaint "which was in the within-named court of the late king and "queen before the within-named *Robert Brooke* and his

* [174. a.]

(a) But now by Stat. 5. Geo. 1. c. 13. §. 1. all writs of error wherein there shall be any variance from the original record or other defect may and shall be amended and made agreeable to such record by the respective

courts where such writs shall be made returnable. See the cases of amended writs of error in 1. *Com. Dig.* 345. *Cowp.* 426. and 2. *Crompt. Pract.* 399. 405.

† Orig. *Salter*.

" fellows

"fellows late Justices of the late king and queen of the
 "Bench within mentioned, between *Rob. Kirke*, otherwise
 "called *R. K.* citizen and *Salter of London*, and *John Parrat*,
 "late of *London*, knight, otherwise called *Sir John Parrat*,
 "knight, of a debt of thirty-nine pounds eight shillings
 "and ninepence, before me and my fellows." And upon
 this return the outlawry was reversed immediately.

(18) IN the exchequer a farmer of the queen brought a
quo minus, and he entitled the queen in his declara-
 tion to the reversion of his term by the grant of his lessor,
 who was *Sir Richard Sackville*, of the reversion made to the
 late duke of *Northumberland*, with his attornment to the duke,
 and that afterwards the duke granted it over to king *Edw.*
 in fee by deed enrolled; and he did not allege expressly that
Sir Richard Sackville granted the reversion by deed, but ge-
 nerally that he granted the reversion *habend^o* in fee, to which
 grant the plaintiff himself attorned; and whether this was
 sufficient or not was much debated in the exchequer, as I
 have heard from *SAUNDERS*, *Chief Baron*. And as it seems to
 me the form above, *s.* without saying *by deed*, is well enough,
 for he is a stranger to the deed and grant, and the deed does
 not belong to him, nor does he convey any title under it.

(19) And also it cannot be intended commonly that the grant
 was without deed, for such grant would be void in law; and
 also the suit of *quo minus* is always for the advantage of the
 king, *s.* to the intent that he may be the better answered
 and paid of his farm; wherefore the Court ought to aid and
 favour the farmer in the conveyance of the title and rever-
 sion to the king. And also I have seen divers precedents to
 support the aforesaid manner of pleading; one in a good assize
 brought *Trin. 17. H. 6. Rot. 121.* where the plaint was
 made of land and rent, and the tenant conveyed to himself
 the lands and rents by the grant of one *A. B.* in tail, re-
 mainder to the king in fee; and prayed aid of the king with-
 out shewing the deed, and without saying he granted the te-
 nement by deed; and he had aid. And afterwards the plain-
 tiff recovered; and the defendant in *Mich. 18. H. 6.* brought
 a writ of error, which is entered in *B. R.* in *Mich. Term*,

In a writ of *quo minus*
 the plaintiff declaring
 the king's title to the
 reversion of his farm to
 be by grant from his
 lessor, needs not allege it
 to have been by deed.
 And at any rate in this
 action the Court shall
 intend it to be a legal
 grant, and aid him for
 the benefit of the king.

Post. 201. a. 2. Inst. 551.

[Doc. Plac 176. 4.
 Bac. Ab. 111, 112.]

Dy. 139. a. 178. a. 229.
 b. Co. 6. 38. Plow.
 148. 22. H. 6. 1. 2.
 Cro. 411. Perk. 14. a. 61.

35. H. 6. 33.

9. Co. 27.

1. 10. H. 7. 29. 20. b.

in the 18th year of *H. 6. Rot. 122.* which I have seen, and there no error was assigned in the said matter, *s. that the donor granted the said lands and rents as above, but a general assignment of error in this form, s. quòd diversimodè erratum est,* without shewing *in quo vel in quibus* And a writ of *scire facias* was prayed to warn the plaintiff in the assize *ad audiendum errores, et Curia inde advisare voluit;* and so it was continued until the next *Trinity Term*, and then nothing further was done. * And also in *Mordant's Book* are divers precedents; as in waste the defendant pleaded in bar a grant of the reversion by the plaintiff his lessor to a stranger, and attornment without saying *by deed.*

* [174- b.]

28. H. 3. 31.

Dy. 172.

Coningsby against Throkmorton.

Custody que use of lands held in *capite* and of other lands held by knight-service of other lords died before 27. H. 8. the king shall have the wardship of all the lands by prerogative.

See *Jenk. Cent. 5. c. 66. S. C.*

4. H. 7. c. 17. *Raft.*
Ward. 20. *Stamf. p. 9.*
B. N. C. 13. 33. *Keilw.*
32. a. 86. 27. H. 8. 4.
12. H. 7. 19. *Plow.*
59. b.

[Wardship taken away by 12. Car. 2. c. 24.]

(20) **A** CASE that had depended undiscussed thirty years in the court of wards was moved in this Term, which was in effect as follows: The tenant of the king in *capite* in use died seised in use of this land, and also of land holden in use of another lord in socage, his heir within age, no will being by him declared: Whether the king shall have the prerogative, or not, of all? And by the report of *R. Kayleway* it appeared in his Book of Reports belonging to *Serjeant Carell*, that in *Easter Term*, 7. H. 8. and *Trin. 8. H. 8.* [*Keilw. 176. pl. 1.*] the above case was ruled by all the Judges of *England* in the exchequer chamber between *Coningsby* and *Throkmorton* for the ward of the heir of *Ruffell*, that the prerogative shall take place: and so is the better opinion, as appears by 13. H. 7. [4. a.] upon long debate.

Williams against Keinfhame.

Trin. 1. El. Rot. 1222.

In debt against the executor of an executor who pleads that his testator *plene administravit*,

(21) **D**EBT brought against the executors of an executor upon a bond made by the first testator: the defendant pleaded, that his testator in his life-time fully administered

(21) *M. 31, 32. Eliz. [3. Leo. 241.]* It was holden in the exchequer chamber, that the executor of a wasteful executor was not chargeable for that of the goods of his testator, for it was conceived to be a personal tort and trespass within the rule, that *actio personalis moritur*

nistered all the goods and chattels which were of the said first testator at the time of his death, and that he the defendant hath no goods or chattels which were of the said first testator at the time of his death in his hands to be administered, nor had on the day of suing out the writ, or ever afterwards; and this &c. To which the plaintiff replied, s. That the said executor of the first testator in his life-time had divers goods and chattels which were of the said first testator at the time of his death in his hands not administered, to be administered, to the value of the debt aforesaid, whereof he in his life-time might have satisfied the said plaintiff of that debt, to wit, at L. in the parish and ward, and this he prays, &c. and the others *à contra*. (22) And it was moved by CHOMELEY and SOUTHCOT, that this issue was a jeofail: first, because the defendant in his bar does not conclude with a *riens inter mains* of his testator, as he himself ought to have done, if he himself had been sued; and the plaintiff in his replication does not allege that the said testator of the defendant had assets in his hands at the time of his death, and for this it is insufficient; for it might be that he once had assets which he disposed of by payments &c.: and also the conclusion is by another affirmative, and so the issue is joined upon two affirmatives; and so was the opinion of the Court, and a replader was awarded; and the defendant pleaded *de novo*, that he after the death of both testators had fully administered all the goods and chattels which were of the first testator at the time of his death, and that he had no goods or chattels which

he must conclude with *riens inter mains* of the first executor, and not in his own hands; and the plaintiff must reply assets at the time of the first executor's death, and not in his life-time, for they may have been rightly disposed of.

Dy. 47. 112. 202. 34. H. 6. 14. a. 10. E. 4. 1.

12. H. 8. Cro. 22.

23. H. 7. Cro. 99.

Nota 185. the speech of Southcote.

Dyer, 185. b.

5. 6. H. 7. 12. a. 26. b.

6. 22. H. 6. 19. 6. E. 4.

6. b. 27. H. 8. 13.

moritur cum persona. [But he may be charged by 4. & 5. W. & M. c. 24. §. 12. 1. Wils. 258. 3. Mod. 112.]

Hil. 33. Eliz. Rot. 603. or 619. in C. B. between Walter and Sutton, [11. Vin. Ab. 361.] and in that case, *Trin. 34. El.* the Court were of opinion to the contrary, that the administrator should make recompence and satisfaction of the goods of the intestate, for he by his misfeasance has made himself debtor in lieu of the first testator, and his executors represent his person; and this was agreed by the Judges, but no judgment was given in the case. So also between these two cases, there was a case, *M. 32, 33. Eliz. C. B.* which was as follows: Judgment was had against an executor, and the sheriff upon the *feri facias* returned, that there were no goods of the testator in the hands of the executor; the executor made A. his executor and died, and a *seire facias* upon suggestion of waste by the first executor was awarded against A. his executor. Upon great debate and shewing of precedents read, and reported by Mr. FENER, in the time of H. 7. it was holden clear without doubt by all there in C. B. that if a *devastavit* had been returned in the life-time of the wasteful executor, that then his executor shall be charged, but the greater doubt was inasmuch as the *seire facias* was not awarded and returnable in his life-time: but yet at last the resolution was affirmative as before, that the *sci. fa.* was well brought against the executor of the wasteful executor. *Mr. Wentworth's Rep. [Off. of Exec. 162, 163.]*

Easf. 36. Eliz. B. R. [Cro. Eliz. 318.] The mother and two daughters are executrixes, the mother wastes the goods and dies and makes an executor; this executor is liable and not the daughters, by POPHAM: and he compared this to the case where the false plea of an executor charges him only who pleads it, & 19. H. 6. 14. H. 7. 28. b. 29. a. 15. H. 7. 8. [Post. 209. a. pl. 23.]

were of the said * first testator at the time of his death in his hands to be administered on the day of suing out the writ, or ever afterwards &c. and the plaintiff averred assets in his hands of the goods of the first testator, &c. And see the entries of this *Easter* Term, in the second year of the present queen, *Rot.* 140.

A Term or more may intervene between the *teste* and return of an original writ.

Dy. 195. 15. *Aff.* 6.
N. B. 21. 8. *Co.* 59.
1. *Ro. Abr.* 484. *Re-*
gister, 207. 21. *H.* 6.
42. 2. 46. *E.* 3. 26. 9.
E. 3. 326.

3. *Cro.* 467. 10. *E.* 4.
308.

[2. *Rol. Rep.* 443. 3.
Will. 344. 2. *Black.*
846.]

(23) **I**T was moved this Term, If an original writ be purchased, and between the *teste* and return one Term, or two, or three intervene, Whether this be a good continuance or not. And it seems that it is; for this is no damage to the defendant, and the plaintiff may give day to the defendant beyond the common day if he will; which see *T.* 15. *E.* 3. 5. [*Lib. Aff.* 43. *pl.* 6.]; and in a note 8. *E.* 4. [13. *pl.* 10.] it is said by *Cumber* that a day by *capias* ought to be given and continued from Term to Term, without one intermediate, because the imprisonment of the defendant would be too long otherwise; but by *disfringas* it is otherwise if the plaintiff choose it.

Sackvill's Case.

Replevin shall not abate for the death of one of the defendants *puis dar-*
rein continuance.

Mo. 17. 1. *Leon* 188.
Styl. 218.

13. *E.* 3. *Bre.* 263. 31.
E. 3. *Bre.* 344.

(24) **I**N REPLEVIN the defendants made consuance as bailiffs to *Lord W. Howard* chamberlain to the queen for *damage feasant*, to which the plaintiff pleaded in bar and made title, upon which the parties were at issue, and the issue was found here this Term for the plaintiff. And upon the evidence given, which was strong and pregnant for the plaintiff, the counsel for the defendants, as *amicus curiæ*, alleged the death of one of the defendants *puis dar-*
rein continuance, and the plaintiff in a manner could not deny it. And now upon the verdict given for the plaintiff he prayed judgment against both defendants notwithstanding the death; and the Court considered long of it, s. whether by the death of one the replevin should be abated in the whole, admitting that the defendant would have time to plead it. And *per CUR'* (except JUSTICE HUMPHRY BROWNE)

3. *H.* 7. 1 b. 11. *R.* 2.
Bre. 638. 38. *E.* 3. 36. b.
10. *Co.* 135. 4. 5. *E.* 4.
33. 7. 2. *H.* 6. 12. b.
10. *H.* 4. 5. b. 33. *H.* 6.
24. 2. 4. 11. *H.* 7. 7. 8.

(24) In deceit against two for levying a fine in *ancient demesne*, if one die pending the writ, that shall not abate it. *Mo. Rep.* *pl.* 49. *H.* 4. & 5. *Pb.* & *Mar.*

the writ shall not abate: wherefore judgment was given for the plaintiff on the last day of this Term. See *M. 9. H. 7. Rot. 292.* In trespass against two at the assizes plaintiff said that one of the defendants was dead *puis darrein continuance*, and prayed that the Justices would proceed to the caption of the jury against the survivor only; and they did so; and judgment thereupon for the plaintiff.

12. H. 4. 11. b. Plow.
90. Mo 395. 2. H. 6.
12. Bre. 9. 44. E. 3.
22. a. 7. H. 6. 21. b.
3. Cro. 145.

[Cro. Eliz. 574. and
see 17. Car 2. c. 8. &
8. & 9. W. & M. c. 11.
§ 6, 7. Salk. 8. pl. 21.]

Skrogges against Coleshil.

(25) **T**HE office of Exigenter of London and other counties became vacant by the death of *Henninges* in the year 1558, and afterwards SIR R. BROOKE the Chief Justice of the Common Bench died, and during the time of the vacancy of both the offices queen *Mary* granted the office of Exigenter to one *Coleshil* by her letters patent, and afterwards by letters patent of the same date granted the office of Chief Justice to ANTHONY BROWNE, who was admitted Judge, and sworn on the first day of Michaelmas Term in the year aforesaid, who refused *Coleshil*, and admitted to it *Skrogges* his * nephew. And now in this Term there was a great contention between them for the said office; and our lady the now queen commanded *Nicholas Bacon*, knight, Keeper of the Great Seal, to examine the right and title of the said *Coleshil*, and to make report thereof to the said queen. Which said Keeper, after the end of this Term, having convened all the Judges of the Queen's Bench, *s. CATLYN, WHIDDON, RASTAL, and CORBET, and SAUNDERS, Chief Baron, and GERRARD, Attorney General, and also J. CARIL, Attorney of the Duchy* (all the Judges of the Common Pleas being excluded), took a clear resolution after long debate and hesitation of all the premises, that the title of *Coleshil* was null, and that the gift of the said office by no means and at no time belongs or can belong to our lady the queen, but is only in the disposal of the Chief Justice for the time being, as an inseparable incident belonging to the person of the said Chief, and this by reason of prescription and usage. And it follows from this, that our lady the queen herself cannot be Chief Justice in the said Bench. And notwithstanding the said resolution of the Judges aforesaid, the queen upon importunate suit directed her commission to the said earl of

The office of Exigenter is in the gift of the chief justice of C. B. and the king's grant thereof even during a vacancy of the chief justiceship is void.

The Exigenter, imprisoned for refusing to answer commissioners appointed by the crown to try his right to the office, held entitled to a *Writ of Corpus cum causa* as a necessary minister to the court.

Noy, 51. 209. Hob. 12,
13. 4. Co. 33. 20. H. 6.
8. 20. E. 4. 18. 3. Bulst.
49. Infra, 206.

* [175. b.]

[3. Bac. Ab 721.]

Plow. 196. 29. b. Co.
Mag. Chart. 425.

Notes, Dr. Coufen's Apology, fo. 83; S. male, M. 18. fo. . by Hurd, who would not take the oath before the ecclesiastical Judges for usury. [4. Leon. 21.] 2. Inst. 65. 478. Noy. 151. 29. E. 3. 37 Card. 160. 29. Aff. 35.

2. Inst. 55.

Bedford and nine others, of whom were CORBET, *Justice*, WHIDDON, *Justice*, SIR ROGER CHOLEMELEY, SIR W. CORDEL, *Master of the Rolls*, and RICHARD GOODRICKE, giving them full authority to hear and determine the interest and title of the said office between the aforementioned parties, and to place *Coleshil* in the office if &c. and that if *Skrogges* refused to make answer before them, that they should immediately commit him to prison, &c. (26) And afterwards, s. in *M. Term* next following, *Coleshil* exhibited a bill of complaint to the said commissioners against *Skrogges*, containing all his title as above, and that he was disseised and deforced of it by *Skrogges*; and *S.* came and demurred upon the bill and jurisdiction of the court by the said commission, and would not make other answer; and for this contempt he was by them committed to the prison of the *Fleet*, and there remained for two weeks, and then request was made by three serjeants in the Bench to grant a *corpus cum causa* directed to the warden of the *Fleet*. And upon good consideration of the Court, s. JA. DYER, A. BROWNE, and R. WESTON, the request was held reasonable and to be granted, because he was a person in the court and a necessary member of it. But what the form of the writ in this case should be *Cur' adv' vol'*, and divers precedents thereof were vouched. And see the form of a general *habeas corpus*, *post* & fol. .

2. Inst. 425.
[*Jenk* 216. p. 59.]

And note the words of the statute *West*. 2. c. 30. for the origin of clerks of assize, s. "All Justices of the Benches " from henceforth shall have in their circuits clerks to enroll " all pleas pleaded before them, like as they have used to have " in time past." And so it seems in reason that the Justices were before the clerks, and made clerks at their pleasure.

* Hilary Term,
2. Queen Elizabeth.

[* 176. a.]

(27) A JUROR was challenged in the Bench because he was within the distress of plaintiff, *s.* the plaintiff was lord of an hundred within which the juror was resiant, and made suit to the leet of the hundred once a year without any other cause of tenure: and this matter was tried on the *voir dire*, and for this he was withdrawn, for it was holden a principal challenge by all the Judges of both Benches, except WESTON and CORBET; and ANTHONY BROWNE was absent, but he was with the former opinion.

If a juror reside within the plaintiff's leet, it is a principal challenge, although no tenure, for he is within the distress.

Jenk. Cent. 5. c. 67 S.C.

17. E. 4. 5. b. 11. H. 4.

2. b. 38 E. 3. 25. a.

9. H. 6. Fitz. Challeng

27. Infra, 1: 5. a. 1

21. H. 7. 2. 38. 2

E. 4. 1.

[Co. Lit. 157. a. Alryn,
29. Bul. Ni. Pri. 306.]

(28) THE lord the king sent here certain letters patent in these words: "*Henry*, by the grace of God of *England* king, heir and regent of the kingdom of *France*, "and lord of *Ireland*, to all to whom these present letters "come greeting. Know ye, that we of our special grace, "and with the assent of our council, and also with the advice "of the Chief Justice of our Common Bench and others our "Justices, have granted to our beloved *Robert Kirkham* the "office of chirographer in our said Bench to have as long as "it shall please us, with the fee and profit to the said office "belonging; provided always that the aforesaid *Rob.* shall "continue in his own proper person in the aforesaid office, "without making any deputy under him, according to the "form of a certain statute in this case made and provided. "In testimony whereof we have caused these our letters to "be made patent. Witness *Humphry Duke of Gloucester*, "Keeper of *England*, at *Westminster*, on the 16th day of "*October*, in the eighth year of our reign." And see *Hil.* 1. H. 6. Rot. 1. a writ of the king directed to the Justices of the Bench to admit *Robert Darcy* to the office of *custos breviarum et rotulorum*, *s.* of chief clerk, which office belongs also to the gift of the king.

The office of chirographer of C. B. is in the gift of the king. So is that of *custos breviarum*.

The chirographer of C. B. cannot make a deputy (a).

Nota. A good precedent for the office of chirographer in the Bench.

Dyer, 151.

2. H. 4. c. 8. Rast. Chirographer, 1.

Dyer, 175.

(a) The clerk of the papers of the King's Bench prison cannot make a deputy. 4. | Term Rep. 716. A constable may, *Cald.* 252. 1. Term Rep. 395.

Sir M. Barkley *against* Sir J. Sulyard.

Whether surrender of the *Banner-bearership* to a master in chancery out of court, who recorded a *memorandum* thereof, but without any delivering up of the patent, is a valid surrender of the office.

Co. Lit. 338. a. 3. E. 6. 36. 3. El. 195. 2. Dy. 355.

* [176. b.]

Co. Lit. 388. a.

Dy 198, 199. Perk. 112.

(29) *SIR MAURICE* having the office of Banner-bearership of the Field by the patent of the king, made a surrender of it about the coronation of queen *Mary*, before one of the masters of chancery, out of court, without delivery or restitution of the letters patent to be cancelled, but the above surrender was accepted, and recorded by the master in these words: "MEMORANDUM, That *Maurice Barkley*, knight, came before me *William Ermested*, one of the masters of the chancery of our lady the queen, on the 29th day of September in the first year of the reign of our lady *Mary* queen of England, and surrendered into the hands of the said lady the queen all that his office called the Banner-bearership of the Field, together with all wages and fees * to the said office due, and of custom appertaining or belonging." And upon this the office was granted to *Sir John Sulyard*, who now has it: and, Whether the above record be sufficient to create a surrender, or not, was the question in a *scire facias* in chancery brought in Hilary Term in the fourth year of queen *Elizabeth*, by *Sir Maurice* against the said *Sir J. S.* And in *Easter* 4th; the matter was compounded by the Lord Keeper of the Great Seal by the assent of the parties. And *Sir J. S.* was removed, and *Sir Maurice* restored to the office without the issues or fees received in the intermediate time.

Bartue and the Duchefs of Suffolk's Case.

The queen licenses *A.* to go beyond sea for a certain purpose, "provided that if he comes with fugitives the license shall be void."

(30) *QUEEN MARY*, on the first of *May*, in the first year of her reign, at the request of the *Marquis of Winchester* and *Mr. Bartue*, who had espoused the *Lady Catharine Duchefs of Suffolk*, the widow of *Charles Duke of*

(30) Note, That the statutes 13. *Eliz.* [c. 3.] & 14. [c. 6.] for Lands, Goods, and Chattels of Fugitives, and their Return upon Proclamation, are all utterly discontinued by the death of the queen, and now we must rest upon stat. 5. *R.* 2. ft. 1. c. 2. *Rastal, tit. Passage & Arrival*, 3. and that the privy seal ought not to be upon a departure there; and if a commission of seizure issue out of the exchequer upon proclamation, and return within six months, that all this is void, and a *superfedeas* ought to be awarded; as for *Lady Bassett*, in the case of *Sir Robert Bassett* her husband, where the opinion of divers was, and of *Henry Altham*, that the king having by seizure, cannot grant copyholds, nor hath but the vesture of the land, as in the case of outlawry; notwithstanding the case of *Sir Francis Englefield*, post 375 b. which see and *quære*, for a guardian in socage may grant copyholds by judgment now.

Suffolk,

Suffolk, executors of his will, for the recovery of certain debts due to the said duke in parts beyond the seas, granted license under her privy signet for such purpose to the said *Bartue* to depart out of the realm, and there to stay until he had recovered his debts, with this proviso, that if the said *Bartue* during his abode beyond the sea should have any resort to any of the fugitives out of the realm, or should repair to any country at enmity with this kingdom, then the virtue of the said license should cease, &c. And by virtue of this he departed out of the kingdom to the country of *Germany* in the dominions of the *Palgrave*, and within a short time afterwards the duchess his wife repaired to him secretly without license; and the truth was, that the cause of their departure was for their religion. During which time of their abode there the queen sent one *Bret*, a messenger, with letters under the privy seal directed to them, strictly commanding them upon their faith and allegiance to return immediately into this kingdom; which *Bret* came to a castle upon a hill near a city of the said *Palgrave* in *Germany*, called *Winbame*, where the said duchess and *Bartue* were, but by the repulse and defence of their servants and allies the messenger could not approach to them to deliver his letters, but was there by their servants and allies ill treated, so that he returned back with his letters. And upon his return he made a full certificate in chancery, with a report of all his journey, and of the contemptuous demeanour which was used towards him: in which he also declared, that *Barlow*, late bishop of *Bath*, and other fugitives, were there in the company of the said duchess; and that he had spoken with them concerning the duchess, who much desired to know whether they were letters or process which he brought. (31) And upon this certificate sent by *mittimus* into the exchequer * a commission issued out of the exchequer to certain gentlemen of the county of *Lincoln*, reciting the departure of the said duchess and *Bartue*, and their adherence to the enemies and rebels of the said queen, and also the said command to repair back into this kingdom; but that they, despising those commands on their faith and allegiance aforesaid, did not take care to return into this kingdom, in contempt of the queen, and against their faith and allegiance, &c. upon which they were commanded by the said commission to seize into their hands, by the oaths of good and lawful men, or otherwise,

"void." By privy seal she commands his return: the messenger is by *A's* servants prevented from delivering the message, and certifies it and a conversing with fugitives into chancery, which is sent to the exchequer; and his lands are seized: 1st, This certificate is not traversable, for the matter being out of the realm cannot be tried by a jury. 2dly, The license is not revocable, being for a time certain. 3dly, Conversing with fugitives does not make it void *ab initio*.

Jenk. Cent. 5. c. 69. S.C. Dy. 128. b. 375. b. 2. Co. 17. Nat. Br. 85. a. 2. Ro. Rep. 143. Dy. 296. a. Perk. 375. b. Mo. 111. 779.

* [177. a.]

[i. Hawk. P.C. 91. 11. St. Tr. 60, 61. 1. Bl. Com. 266. 4. 222.]

all goods, lands, and tenements &c. and to return the rents of the said lands into the exchequer &c. (which was done accordingly until their return now within this year :) since which time they have tendered a traverse in the exchequer to the contempt, with an averment that they did not adhere to the fugitives &c. alleging first their license, with an averment that their suits for their debts to be recovered were not yet determined, &c. Whether upon this matter they shall be restored to their lands and goods without a fine for the contempt, was much doubted and debated among the Judges. And by the better opinion it was conceived that the certificates of the messenger recorded in chancery, and sent by *mittinus* into the exchequer, in which the prince also records a contempt, and refusal to come into this kingdom, ought to be credited as true, and no traverse by law can be taken to it, because it cannot be tried by any *visne* of the kingdom. But *quare* whether the messenger ought not to be sworn (which does not appear), as one who makes an affidavit of the service of a *subpœna*. Also by the better opinion it was thought, that the breach in the *proviso* in the license by repairing to and being conversant with the fugitives, has no relation to make the license void *ab initio*, as some conditions do, because the words are “*that then the virtue of the license should cease*,” which ought to be taken only from thenceforth. Also it seems by the better opinion, that the license which was granted for a time certain was not countermandable or revocable by the prince. See the like of this *+* 10. H. 4. 5.

2. Keb. 704. 3. Keb. 147. 2. Rol. Rep. 107. 39. H. 6. 7. 2. Bro. License, 9. 9. 20 E. 4. 4. b. Bro. Repeal. 1.

[13. Vin. 561, 562. 4. Bac. Ab. 170, 171. 4. Term Rep. 81. Jenk. 208, pl. 41. But see Lanc. 46. and Jenk. c. 5. c. 69. that it is revocable.]

Cestuy que use before 27 H. 8. devised that A. B. and C. his feoffees, should sell his land. A dies; the survivors cannot sell.

10. H. 8. 9. 2. Co. on Lit. § 163. fol. 112. b. Co. Lit. 181. 30. H. 8. Bro. Devise 31. Fulb. Paral. 1. 1. f. 45. Dy.

(32) *CESTUY QUE USE* (before the statute) in fee willed by his testament, that A. B. and C. his feoffees, should suffer his wife to take the profits of his land during her life, and after her decease that the premises should be sold by his said feoffees, and the money therefrom received that the feoffees should pay to certain persons and to certain intents prescribed. The testator died, A. died, and the wife

(32) *Hil. 26. Eliz. C. B. Between Vincent and Leigh.* [Cro. Eliz. 26. Mo. 147. 3. Leon. 106.] The case was, A man devised to his son in tail, and if he died without issue, that the four sons-in-law should sell and distribute the money to his daughters: the son died without issue; one of the sons-in-law died, and afterwards the devilor died; and it was adjudged that the sons-in-law who survived might well sell, for it appeared that his intention was to advance his daughters; and a difference was taken where they are named by their proper names, and where not.

died.

died. Whether *B.* and *C.* the survivors may sell. And it seems not, and so it was ruled; but *quære* if they had not been named *A. B.* and *C.* but feoffees only. See 15. *H.* 7. 12. [b. pl. 22.]

cut', 7. 1. Ro. Ab. 222. E. 13. Gould. 2. Bridgem. R. 114. [Co. Lit. 113. a. 2. P. W. 308. Cowp. 464. Powel on Devises, 292.—306.]

191. a. 210. a. pl. 24. 371. pl. 3. 49. E. 3. 17. a. Perk. 105. 550. Bro. Condition, 56. Dy. 219. a. pl. 8. 21. H. 6. 10. 21. H. 8. c. 4. Exe. Mr. Hargrave's note (2.)

* [177. b.]

*(33) NOTE, That this Term, judgment was given in an action founded upon the statute of the 1st and 2d of *Philip* and *Mary* [c. 12.] for chasing a distrefs out of the hundred and county where it was taken, s. that the plaintiff should recover one hundred shillings, which is the forfeiture contained in the statute, and treble damages according to the statute, but no costs; although the jury at *nisi prius* in *Essex* at the last assizes had assessed costs. And whether the judgment should be *quod defendens capiatur &c.* or in *misericordiâ* was doubted, and it was stayed till the next Term, therefore *quære* thereof (a). But a precedent was seen for the costs expended as above, about the 5th and 6th years of *Philip* and *Mary*.

No costs shall be had on 1. & 2. P. & M. c. 12. although the jury assess them.

Whether upon this statute judgment against the defendant shall be *quod capiatur* or in *misericordiâ*.

27. H. 8. 10. 1. & 2. Eliz. Rot. 1422. Rast. Distrefse, 11. 1. Rol. Ab. 516. (B) 4. 222. Noy. 52. 18. Co. 116 B. N. C. 117. 5. E. 4. 7. Dy. 159. [Sayer on Costs, 230. Cowp. 366. but see 1. Term Rep. 71. contra and 1. Hen. Bl. 11. 2. Term Rep. 154.]

(33) *Trin.* 38. *Eliz.* B. R. Error by *Partridge v. Wilcocks*, [Cro. El. 480. Moor. 453.] Upon a judgment in *C. B.* upon the stat. 1. & 2. P. & M. where the case was: *Wilcocks* and four others distrained one hundred of *Partridge's* sheep for *damage feasant*, and each of them impounded twenty in five several pounds, and *Partridge* sued them by a writ (and well) upon that statute, and recovered forty shillings, which forty shillings was trebled against each of them, and also five pounds against each of them for the forfeiture given by this statute; and it was holden by the Justices in *C. B.* that each offender should forfeit five pounds, and that the damages should be trebled against each, and that if the severance of the distrefs be not in several liberties, so that one replevin will serve for all, no action lies upon this statute. And by *ANDERSON*, that if one act against the will of the others, he only is punishable. And by *SPURLING*, if the five had been commoners in the land where &c. they might sever the distrefs &c. for it was a several tort to them, to which no answer was given. But now in *B. R.* by *POPHAM*, *CLENCH*, and *GAWDY*, that it was error, for the damages shall be trebled only once against all the defendants, and one forfeiture of five pounds only for all, for it was a joint offence, the taking and severance being by their agreement, and the statute shall be intended of several offences for the forfeiture of several five pounds, and not of several offenders, and a joint offence. And by *FENNER* that it ought to be several actions against each. And after that, *GAWDY* on taking up the statute, seemed there to doubt more, and to alter his opinion, and therefore the Court commanded and gave day to search the precedents, and so it rests. [1. Salk. 182. Cowp. 610. and see ib. 640. 2. Black. 906. 2. Term Rep. 712. 3. Term Rep. 509.]

(a) Vide ante, 67. b. note (a), and Cro. Car. 559, 560. 4. Com. Dig. 179. 2. Bac. Ab. 514.

On a false return of a panel by a sheriff that it was arrayed by his predecessor, the party may challenge it for coinage notwithstanding the return.

Co. Lit. 157. a. 7. H. 7. 4. [Cro. Eliz. 369. 3. Bac. Ab. 238.]

(34) **T**HE sheriff returned on a *venire facias* in a plea of land, that that writ was so executed and indorsed by *A. B.* late sheriff, his predecessor, with the panel; where in fact that panel was made and arrayed by himself the now sheriff. The party may challenge this array afterwards for coinage or affinity of the sheriff, and this shall be tried by two triors notwithstanding this false return, which see *Mich. 8. H. 5. Rot. 128.*

Trin. 4. & 5. P. & M. Rot. 341.

Wrottesley against Adams.

A lease by a prior is made to a woman for years, who marries and dies, the lessor grants the reversion to the plaintiff for years, "to commence from the end of the expiring of the first term of years." The husband marries again, devises his term to his wife, and dies in possession; she also marries again, and with her husband accepts a lease for lives from the patentee in fee-simple of the king to whom the prior had granted the reversion. By this acceptance the first term is surrendered and merged; and the plaintiff may by virtue of his lease enter immediately, as well as if the years had been gone by the effluxion of time.

[Raft. Ent. 253. b.]

[See] Plow. 189. b. [S.C. and the books there cited.]

Roll. Continuance 357. Dy. 93. b. 31. Aff. 13.

* [178. a.]

Plow. 197.

Dy. 124. b. 225.

(35) **A** LEASE is made to a woman for a term of years, who took husband and died; the husband is possessed of the term, and afterwards the lessor by deed indented grants and demises to the said *Wrottesley* the tenements by these words, *s. the reversion of all that his farm in B. and also another tenement there, with all lands, leases, pastures, and meadows to the same belonging, with all and singular their appurtenances now in the tenure of R. Wilcocks (who was the husband of the first lessee), to have and to hold all the said ferme and tenement with all other as afore is rehearsed to the said R. Wrottesley and his assigns from the end of the expiring of the term of years granted unto the said R. Wilcocks to the end and term of sixty-three years then next ensuing &c.*

(35) And afterwards *Wilcocks* took another wife, and made her his executrix, and by his will also devised her term, and died; and the wife entered and claimed by the devise. And afterwards she took another husband; and she and her husband having the said term in possession, took a lease for the term of their lives of him who had the fee-simple (by which the term is merged and gone); upon which *Wrottesley* before the expiration of the term of years, supposing that his second lease took commencement and effect, entered upon them, and was ejected by them; and all this matter was shewn in the count, and in the *oyer* of the indenture, which * was prayed by the defendant: upon which the defendant demurred in law. The first point is, Whether by the premises of the indenture, the reversion of the farm only be granted, and the other tenement in possession be demised, or only the reversion of it also; and then by the *habendum* of the farm and tenement in possession

session from the end of the expiration of the term of years &c. whether this was a good lease without attornment (a). (36) Also there is another point in this, that it is supposed in the *habendum* that the first term of years was granted to *Wilcocks*, which is false, if he shall be taken by the word *grant* the first grantee or lessee, for by the intermarriage the term in law which was in the wife was granted to the husband. Also the last point, Whether the second term commences before the expiration of the first years by effluxion and lapse of time of years fully completed, because the words are, "from the end and expiring of the term of years &c." And in the case here, although the term be determined, and merged in law by the taking of the higher estate, yet the number of years of the said term are not gone or expired yet.

And many exceptions were taken to the form of the declaration: first, because no averment was made that the tenements aforesaid were in the tenure of the said *Wilcocks*: also because it is not expressed that the prior was seised of the reversion at the time of the grant of it made to the king, but it is only intended, for the words are "*and afterwards the said prior &c. granted the reversion*;" and it does not say, "*so being seised*," or "*in form aforesaid seised*." Also the grant of the reversion to king *H. 8.* was alleged to be made since the statute of 31. *H. 8.* [c. 13.] for the dissolved abbies, and concludes "*by virtue of which grant and of a certain statute &c. made on the 28th day of April in the same year, king H. 8. was seised of the reversion aforesaid in his demesne as of fee in right of his crown*;" and no time certain alleged in whose time the monastery was dissolved, s. in the time of *H. 8.* or in the time of *Ed. 6.* or in the time of *Queen Mary &c.* and before the dissolution, the king could not be seised by the authority of the act. Consider the statute thereof well.

(37) Also the demise for term of life, made by the grantee of the reversion from the king, was to the first termor, the said termor then being possessed, and it is not alleged "*by deed*," which cannot enure, unless by deed of confirmation or release to enlarge the estate &c. Also two exceptions to the writ, s. because it wants the words *goods and chattels*, which are put in the writs of *ejectione firmæ* in the Register. Also it supposes that the prior and convent demised, which is false; for the convent are not lessors, but only the prior &c.

Plow. 192. 37. H. 8. Attornment, 41. 2. E. 6. B. Attornment, 45. Dy. 26. a. 46. b. 58. 377. 1. Ro. 212. 2. Keb. 487. 611. Ante, fol. 6. pl. 4. Plow. 198. Coke, 153. b.

4. E. 6. B. N. C. 409. 1. Co. 154.

1. Plow. 191, 192, 193. Dy. 207.

26. 34. 49. Aff. 36. 3. 5. 49. E. 3. 14. 2. R. 3. 2.

Dy. 174. 2.

Register, 227. b. Plow. 199. 229.

(a) Attornment rendered unnecessary by 4. Ann. c. 16. §. 9. See *Dougl.* 232.

Dy. 40. b. 97. a. B.
 Alienat. 9. 1. Ro. Ab.
 212. Dy. 125, 126.
 Plow. 163. 6. Co. 36.
 9. H. 6. 12. b. Register,
 368. 3.E.6. B.N.C. 395.

And as to the three matters in law, all the Judges argued to one intent, *s.* that the grant of the reversion *habendum* the land for years from the end of the term &c. countervails a good lease of the thing. Also the word *demiſe*, *Anglicè* granted to *Wilcocks* is good enough; and although it were false, as it is sufficiently verifiable, yet the false recital should not defeat the grant: and see this in the case of *Mount'* in the county of *Buckingham*, in *Vetero Libro Repertorium*, fol. 78. [ante, 116. a. pl. 70.] And that the second lease commenced * immediately after the end and determination of the first term without waiting for the expiration of the years and time of the first term; for to this word *term* of years the emphasis and accent shall be referred as to the substantive and chief part of the sentence &c. And an *ad terminum qui præterit* well lies in such case if after surrender the lessee will hold out his lessor, although it be within the space of the time of the years &c. And to the first exception of the averment all agreed that it does not need it, but to the other exceptions they differed in opinions.

* [178. b.]

Plow. 198. a.
 1. Co. 153, 154.

Dy. 62. a.

Plow. 187. 20. Aff. 8.
 9. H. 6. 12.

After making a lease for years the lessor assured his wife a jointure on the lands, and then aliened them. On the death of the husband the wife enters, and the tenant attorns to her; this is a disseisin or not at the election of the alienee.

Simile ante, [173. a. pl. 15. quod vide.]

1. Ro. Ab. 662. 1. Mar.
 94. b. Lit. 134. a. 13.
 El. 302. b. Dy. 18. b.
 Lit. §. 588,

(38) **A**LEASE was made for years of the scite and demesnes of a manor, and afterwards the lessor assured a jointure of the same land to his wife for her life, and afterwards aliened the fee-simple, and the alienee enjoyed the rent by the hands of the termor, and afterwards the lessor died: the wife entered upon the scite, and claimed her jointure, and held a court there; &c. And the termor upon this assented and attorned to the wife, and paid her the rent. Whether this be a disseisin of the alienee, or not, was moved. And as it seems, it is at the pleasure of the alienee to take it so, notwithstanding the continuance of the possession of the termor, by CATLYN, SAUNDERS, WHIDDON, WESTON, and DYER, and A. BROWNE *è contra*.

G. Willoughby's Case. In Cur' Ward.

The court of wards cannot dispose of the land of any ward not yet under their care, and of such only during minority, and until they have

(39) **A**LEASE was made by the queen to the said *G. Willoughby* of all the lands which she had by the wardship of *T. Willoughby*, to have and to hold them during the minority of the said *T. W.* or of any other of his heirs,

or

or heirs male being within age, and in ward to the queen. *T. W.* died without issue during his minority, *R. W.* his brother and heir is within age, and in the ward of the queen.

Whether shall the lessee enjoy the premises during his minority by reason of the disjunctive "or", or not? And note that this lease was made by the queen under the seal of the court of wards by authority of stat. 32. *H. 8. c. 46.* concerning the erection of that court, in which the 17th, 18th, and 19th articles are to be well weighed and considered in this case. And afterwards my LORD CHIEF JUSTICE, my LORD CHIEF BARON, and I, thought that the meaning of the makers of the said statute was not ever to give authority to the said court to dispose of or demise any lands of any ward which might happen afterwards, but only of such wards as they were in possession of, *s.* during their minority, and also afterwards until they have sued livery, or until after the death of the eldest ward an office of the next ward be found: and accordingly an order and decree was made in *Easter Term* next, *W.* dying.

sued out livery, or if the ward should die, until an office have found the next ward.

Dyer, 108.

14. E. 4. 7. 2. 14. H. 8. 13. *Crompton's Courts*, 121. b. *Raft. Wards*, 24.

39. H. 6. 48. *Dy.* 253.

[The court of wards was taken away by 12. Car. 2. c. 24.]

Sabell's Case,

AND

Bury's Case,

* [179. a.]

(40) MEMORANDUM, That in this Term sentence of divorce *causa frigiditatis naturalis*, and perpetual dissolution of the marriage *ab initio* was given in the audience court of the archbishop of *Canterbury* between *T. * Sabell* and his wife, the daughter of *Richard Lee* knight, who was partatrix and complainant of the unfitness and impotence of procreation in her husband, who was also adjudged so by the physicians. A similar judgment was given in the same year, or in the year next following, against *Bury* in the county of *Devon* at the suit of his wife: and the woman was married to *Cary*, by whom she had issue, and she gave all her inheritance

Divorce *causa frigiditatis* is a vinculo matrimonii, but if both marry again and have children, they shall cohabit together again, for the church was deceived.

1. Rol. Ab. 445. 2. Inst. 687.

[Jenk. Cent. 6. c. 34. S. C.]

[Bury's Case, 10. State Tr. Ap. 22, 23. S. C.]

Hil. 37. *El. Stafford v. Mongy*, [Sec 4. *Fin. Ab.* 221, 222.] In a case of bastardy, the wife sued a divorce for frigidity, and afterwards the husband married another woman, by whom he had issue; and it was adjudged that the second marriage is void: and there the civilians gave the rule, *qui aptus est ad unam aptus est ad aliam, et quando potentia reducitur ad actum debet redire ad primas nuptias*. From the book of *Mr. Thomas Tempest*.

Impotence and frigidity *quoad banc* is sufficient cause of divorce after explanation and trial for three years, and other ceremonies enjoined by the canons, and the second marriage of both is good notwithstanding that the impotent party have children. *Harrison's Reading*, Lent 1632. *Carr and Essex's Case*, [1. *St. Tr.* 315.] cont.' at this day by LORD WINDSOR.

2. Leon. 169. Mo. 225.
5. Co. 98. b. 3. Bull. 42.

[2. Burn Eccl. L. 445,
446. Gibl. Cod. 446.]

43. E. 3. 23. a. 44. Aff.
12, 13. 18. H. 6. 34.
1. Inst. 383.

to *Cary* her second husband. And *Bury* also was married to another woman, by whom he had issue, as it is asserted; and in this case the opinion of the doctors is, that then the persons shall be compelled to commune and cohabit as man and wife, because the holy church was deceived in its former judgment, and therefore great suit was made to stay the ingrossing of the fine; but after one Term it was ingrossed by the command of the Judges, against the command of the Keeper of the great seal.

Herbert et Ux'. v. Vernon et Al'.

In dower against several defendants some confessed the action, the others are not entitled to a view.

7. H. 7. 6. 40. E. 3.
20. 14. E. 3. F. View,
22. 1. Aff. 62. Stat.
West. 2. c. 3. 12. H. 4.
19. 26. H. 8. 2. 34.
H. 6. 3. 44. E. 3. 31.
a. Vide 12. H. 7. 3.
a. 34. 35. H. 6. 10.
60. a. b. View. 7.
[5. Com. Dig. 592. 2.
Bac. Ab. 147, 8.]

(41.) **I**N dower by *Herbert* and wife against *Vernon* and others, some confessed the action, and the others demanded a view; *quare*, whether they shall have it, or not. But at first all the Judges seemed clear that they shall have the view, because they did not vary in dilatories, &c. Yet see 11. R. 2. [Fitz. Tit. View. 66.] and 46. E. 3. and 33. H. 6. [21. b. pl. 21.] to the contrary; and 14. H. 6. fol. 6. [5. a. pl. 23.] And according to those books in this action, which is favoured in law, the view was ousted at last, with an offer of the Court that they would seal a bill of this exception, which was not answered.

Easter Term,

2. Queen Elizabeth.

[179. a.]

(42) A MAN arraigned of felonious homicide pleaded not guilty, and was found guilty; but for the difficulty of clergy in this case, he was reprieved without judgment: it was moved to the Judges, whether he be bailable in the mean time or not. And it was holden by the Judges that he is not, because he is more than a vehemently suspected person when he is convicted of the offence: for the intendment of the law of bails is, that it stands indifferently whether he be guilty or not, until trial &c.

A man convicted of felony is not bailable.

Jenk. Cent. 5. c. 68. S. C. Stamf. 71. 44. E. 3. 38. b. 2. Inst. 188, 9. Bro. Mainprize, 53, 94. 2. 29. Aff. 3. Plow. 67. 16. E. 4. 5.

[2. H. H. P. C. 130. 132. 2. Haw. P. C. 153, 154-175, 176.]

(43) IT was moved at the bar for a question, If two joint-tenants in fee make partition at this day out of the county where the land is by parol only, whether this be a good partition or not, without writing, and also made in a foreign county? And A. BROWNE, *Justice*, and I thought not, because the common law in this respect is not altered by the statutes of 31. and 32. H. 8. [c. 1. and 32.] but they only compel them to make partition by writ * to be devised in chancery, as co-parceners by the common law were. But H. BROWNE, J. and WESTON, *Justice*, *à contra*. Therefore *quære*. See thereof East. 18. [Eliz. fo. 350. b. pl. 20.]

Whether joint-tenants may make partition by parol, and out of the county where the land lies, *quæ*.

Go. Lit. 12. b. 3. E. 4. 9. a. 47. E. 3. 22. a. 10. H. 6. 25. b. 3. H. 4. 2. a. Fitz. 62. 19. Aff. 1. Litt. 65. a. 2. Rol. Ab. 255. Mo. 29. 1. Leon. 103. Bro. Partition, 27.

[See Mr. Harg. note (2) to Co. Lit. 169. a. 3. Bac. Ab. 207.]

* [179. b.]

Kempe against Hales.

(44) THE office of clerk of the hanaper was granted by king Henry 8. by his letters patent to Sir Ralph Sadler, knight, and John Hales, for the term of their lives and the life of the longer liver of them, of which grant there were made two patents of the same form and state, and one was called a duplicate, and the word *duplicate* written a little above the seal, and that part was in the custody of I. Hales; and the principal patent was inscribed *per warrantiam de*

The clerkship of the hanaper is granted to A. and B. having only a duplicate: A. surrenders the original patent, the duplicate cannot aid B. for it is made by the chancellor's own pleasure without warrant.

privato

See 1. Eliz. 167. a. 195.
Perk. 25. 118.

[Ante, 176. pl. 29. 4.
Com. Dig. 396.]

Pal. 91.

3. E. 6. c. 4.
Rast. Grants, 2.
Bro. Patents, 58.

13. El. c. 6.
Plow. 492.

[4. Com. Dig. 399.]

privato sigillo auctoritate parliamenti, and this remained with *Sir Ralph*; and this patent was surrendered and cancelled by him, the said *Hales* being then in *Germany*; but there was no cancelling or *vacat* of the enrollment of this deed: and a new grant was made by queen *Mary* with a recital of the first patent, and of the surrender and cancelling to the said *Sir Ralph* and one *Kempe* of the said office. And moreover *I. Hales* had sealed and signed with his hand a blank parchment among divers other such blanks at his departure out of the realm: and one *Stephen Hales* his brother in his absence wrote a formal release made in the name of his brother to the said *Sir R.* before the surrender above-mentioned of all his interest in the office and patent: and now on his return he claimed his joint estate in the office that he had before his departure, and shewed the duplicate entire, and undefaced. Whether his interest be good or not, was in question. And many thought, that when the original patent is cancelled the force of the duplicate is gone in law, so that no title can be made by this patent, because it was granted and sealed by the chancellor at his pleasure, and without any warrant of the king to do it.

A man made a feoffment of borough English lands to descend in tail according to the course of common law, still the youngest son shall inherit, and not the eldest.

Jenk. Cent. 5. c. 70. S.C.
4. Mar. 134. a. 163.
167. 72. b. Noy. 106.
3. 2. E. 3. Age, 81. 11.
E. 3. Formedon, 30. 5.
21. E. 4. 7. 24. b. B.N.
C. 302. 1. Co. 103.
Davis, 36. b. 31. a.
[Co. Lit. 10. a. Mr.
Hargrave's note (3) and
110. b. note (5.) Ro-
binson Gavelkind, 74.
2. Black. Rep. 1228.]

(45) A MAN seised in fee of lands in borough English after the statute 27. H. 8. [c. 10.] made a feoffment to divers persons in fee to the use of himself and of his heirs male of his body begotten, according to the course of common law; and afterwards died seised accordingly, having issue two sons: the eldest entered, and held out the youngest. *Quere.* And all the Board in *Serjeants Inn* thought that the youngest shall have it by descent, notwithstanding the words aforesaid. See 26. H. 8. fol. 5. a.

Bruse against Bonet.

A fine levied upon a writ of customs and services, where it recited that there was a dispute about castle guard and murage, and now the lord granted that the conquer should be quit of the aforesaid services,

(46) THIS is the final agreement made in the court of the lord the king at *Westminster* from the day of *St. Michael* in fifteen days in the [51st (Benl. 116. pl. 149)] year of the reign of king *Henry* son of king *John*, before *GILBERT DE PRESTON* and *ROGER DE MESSENDON*,
Justices,

Justices, and other faithful subjects of the lord the king then there present between *William de Bruſe* complainant and *Hamo Bonet* defendant *, of the customs and services which the said *William* required of the said *Hamo* of his freehold which he holds of the said *William* in *Wowood* and *Wappingthorn*, to wit of one knight's fee and a half with the appurtenances, and whereof the said *William* required the said *Hamo* that he should do to him for the ward of the castle of *Bamburgh*, when it happens, and for the murage of the said castle when it is necessary, as much as to the said tenure belongs; which services the said *Hamo* did not acknowledge to him, and whereof it was impleaded between them in the said court that the said *William* hath granted for him and his heirs that the said *Hamo* and his heirs and their tenants of the honour of *Bamburgh* should be quit of the aforesaid services for ever, saving to the said *William* and his heirs all other services to the said tenement belonging. And for this grant, fine, and agreement, the said *Hamo* hath given to the said *William* eighteen marks of silver. And this agreement was made with the assent and will of the said lord the king, and he permitting it. (47) And by the opinion of all the Judges of *Serjeants Inn*, *prima facie* the intent of this fine was to release the tenure of knight-service, and to make and reserve a socage tenure only. And note the above tenure was and contained one knight's fee and a half. But by the opinion afterwards, *s. in Trin. Term*, in the 5th year of the present queen, the opinion of the Judges of the Bench and of JUDGE SOUTHCOTE was holden otherwise; for by the office found in the first year of *Hen. 4.* the tenure was found to be by the service of one knight's fee and a half, and this may well stand with the fine above, for the tenure might be in chivalry before the fine above, and that the castle-ward and murage were only exacted and pretended, and not of right.

saving all other services, this discharge of murage and castle guard, which it may be were not of right due, is no discharge of the tenure in chivalry.

[Bendl. 116. pl. 149. S. C.]

[By 12. Car. 2. c. 24. all the consequences of feudal tenures abolished.]

26. Aff. 66. Post. 230. b. 7. 25. E. 3. 39. 45.

11. E. 3. Release, 32. Mo. 631. Dy. 157. b.

Calverley against Biefeley.

(48) *CALVERLY* impleaded *B.* for debt on bond indorsed with condition to save him harmless for his account of the sheriffalty of the county of *York*, and to acquit him of it

The warrants of attorney may be entered on the roll after error brought, but the attorneys shall forfeit each

(48) *E. 36. El. B. R.* Error by *Woodward*, of *Lincoln's Inn*, *v. B.* [Cro. El. 537.] *W.* had made a bill for fourteen pounds to be paid together with six pounds; *B.* brought debt for twenty pounds in *C. B.* and declared upon the bill, and recovered: *W.* brought error in

ten pounds by stat. 18. El. c. 14. though the issue be on *multi record*, and so not to be tried by a jury, for it is still an issue (a).

Several judgments in debt against two on several *præcipes* and several issues, one writ of error to remove both records is bad.

2. Bulst. 170.

Dy. 363. 231. 125. 262.

b. 8. Co. 162. 19. H. 6

6. 7. 41. 1. 2. 15. 4.

E. 4. 13. 3. 7. 8. H. 4.

30. 4. and 26. 3. and 4.

and 5. 1. 15 H. 7. 13.

74. Raft. Replacder,

365. 1. Ro. Ab. 290.

(1) 2, 3.

* [180. b.]

[1. Com. Dig. 13.]

Bro. Error, 150. Dy.

173. Pal 198, 199. 4.

H. 6 c. 3. Raft. A-

amendment, 2. 8. H. 6.

c. 12. Raft. Amend-

ment, 3.

it in the exchequer; and he pleaded the finishing of the account in the exchequer, and a *quietus est* there recorded of it: to which the plaintiff replied, *nul tiel record*, wherefore day was given to the defendant at his peril to have the record here in the Bench at a certain day; at which day he failed of it, wherefore he was condemned by judgment, and no warrant of attorney was entered pending the plea; wherefore the defendant brought a writ of error returnable *Mich. Term* last, in which he did nothing, nor prosecuted it. Now it was prayed of the Court this Term to grant that the warrants might be received and entered upon the roll: and by the opinion it well may be done, by reason of the laches above; but the attornies should forfeit each ten pounds according to the statute of Jeofails [32. H. 8. c. 30. §. 2.] because this was an issue joined, although it was triable by the record, &c. But the truth of the case was as follows: The writ of debt was brought against *Bieseley* and another by several *præcipes*, and several issues* joined, and several judgments, and one writ of error only, to remove both records, supposing the plea between *C.* plaintiff, and *B.* and the others defendants, which is not good in this case. And for this cause *HEIWOOD* in *B. R.* refused to receive the certificate: and then the case was better by the amendment of the error, and so it was ruled, but the amercements above stood.

B. R. and there the judgment was reversed, for the bill was good only for fourteen pounds, and void for six pounds, because it was not expressed in the premises. See something like this case *Trin. 30. Eliz. Rot. 771.* in *B. R.* between *Stone* and *Witbpoole* (b).

Trin. 42. El. C. B. v. Selbie and Bowes. *B.* was outlawed in debt by *S.* and afterwards purchased his charter of pardon, and sued a *scire facias* against *S.* and *S.* had judgment upon it to recover, and *B.* brought error, because upon the *scire facias* there was no warrant of attorney entered for *S.* And *per Cur.* it is no error, because the warrant of attorney in the first action of debt is sufficient, for upon the *scire facias* the plaintiff declares upon the original, and the *scire facias* upon the charter of pardon is only *stare recti in curia*.

Mich. 36. Eliz. It was moved by the queen's solicitor; A person had sued a libel for three several things against *B.* in the spiritual court, whether *B.* may have one prohibition for all, or three for the things severally; and the Court said that he might have the one of the other at his election, if he will be at the charge. [But it seems two persons cannot join in a declaration upon a prohibition where the causes of complaint are several. *Yelv. 128. Cro. Car. 162. Raym. 425. 1. Leon. 286.*]

(a) By 18. El. c. 14. no judgment shall be stayed or reversed for want of any warrant of attorney; but now see 25. Ger. 3. c. 80. §. 1. 13. and 19. And for amendment of records after error brought see Dougl. 114. c. Bur. 2730. 1. Term Rep. 783. 3. Term Rep. 659. 749. 1. Com. Dig. 442. 320, 321.

(b) *Stone v. Witbpoole* is reported in *Cm. El. 126. Ow. 94. 1. Leon. 21. Poph. 152.* and cited in the margin infra, 272. a. pl. 31. but in none of these reports does there appear any similarity to the point in *Woodward's* case here mentioned.

(49) **T**HE conusee of a statute-merchant sued out of chancery upon a certificate made by the mayor &c. a *capias* against the conusor, returnable into the Bench; at which day the sheriff returned *non est inventus*; and the conusee shewed there the statute, as he ought, and had an *alias capias*, before the return of which he died. Whether the executors shall have a *scire facias* against the conusor, or whether they ought to commence *de novo*, *s.* to sue a new special writ out of the chancery to the mayor, to make a certificate, notwithstanding the first certificate, and to have out of chancery a new *capias* or not, was much doubted among the Judges and the clerks of the court: or whether at the suit of the executors the Judges of the Bench may award an *alias capias*, or a writ of extent or not. And see *E.* 17. *E.* 3. [31. pl. 32.] in a note, that two sued a statute-merchant, the certificate returned into *C. B.* *non est inventus*, the plaintiffs did not come, but others, as their executors, offered themselves, and swore that they had the will, and prayed execution, and had it, by the printed book, and *Fitz. Abr.* [Tit. Execution, 53.] But in the *MS.* of *T. Gargrave* the words '*bad it*' is wanting. And afterwards it was agreed clearly by the Court that no *scire facias* lies in this case, but if any process shall be issued, it shall be such process (*s. extendi facias*) as the conusee himself ought to have had if he had lived, and so *A. BROWNE* held strongly, but *WESTON* and I to the contrary: for there is a special writ in the *Register* [148. b.], that the executors of the conusee upon affidavit in the chancery that the debt was not satisfied in the life-time of the testator, or afterwards, should have a new *certiorari* to the mayor, &c. to make a new certificate of the statute, notwithstanding the first certificate. And also no precedent could be discovered for the remedy in *C. B.* for the executors in this case. Wherefore at length the party was advised to commence entirely *de novo*, because that was the clear way, and sure without error. Yet see *Duplede's* case, *An.* 2. *R.* 3. [fo. 7. pl. 14.] well, and 15. *H.* 7. [16.] and see stat. 5. *H.* 4. c. 12. and see *H.* 9. *H.* 5. *Rot.* 461. where the executor of the conusee prosecuted in the Bench by attorney by the writ appointed and directed to the Justices there.

The executors of the conusee of a statute-merchant, who in his life-time had sued out a *certiorari*, and proceeded to a *capias* against the conusor, cannot have a *scire facias* or *alias capias* or a writ of extent, but must commence entirely *de novo*.

2. *R.* 3. 8. 36. 6. b. 2.
Ro. Abr. 467. 9.
 8. *E.* 3. 13. 10.
B. Fynes levy, 67.
Ad. Tenures, 11.
B. Execut. 60.
 14. *H.* 7. 17. a.
 11. *Car. Cro.* 451.
 1. 7. 18. *E.* 3. 31. a. and 37. 2.

15. *H.* 6. 16.
Dy. 299. a.
 18. *E.* 3. 10. Executors, 55.

Fitz. 131. b.
Went. 145. 149.

[See] 1. *Cro.* 451. 457.
 [2. *Bac. Ab.* 336. 2. *R.* 3. 8. pl. 16.]

36. *H.* 6. *B. N. C.* 294.
Raft. Recognizance, 5.
 1. *Ro. Rep.* 17.

Where a bargain and sale was made to be void on condition of payment of a sum to the vendee, *his heirs, or assigns*; on his death tender made to the executors alone is not good, for they are not *assigns* of the testator.

* [181. a.]

Co. Lit. 210. 181. Fitz. 78. a. 2. R. 3. 8. 15. H. 7. 16. B. N. C. 267.

[1. Inst. 208. b. and Mr. Butler's note (1). 3. Bac. Ab. 637. 3. Com. Dig. 306, 307.]

Went. 134. Hob. 9. Br. Departure, 1. 5. Co. 76. Com. 287. Lit. 78. Fitz. 97. 27. H. 8. 2. 5. Co. 96. 12. E. 3. Tit. Condition, 9. 31. H. 8. 45. Lit. §. 336.

[Vide ante 6. b. and the notes and references there.]

Ante, fol. 73. Fitz. Condition, 8. The payment ought to be made to the heirs, for the assignees in his intent are not assignees of the estate.

(50) CARUS moved at the bar for the stay of a *nisi prius* to be holden in London, inasmuch as the issue was void, and a jeofail: and the case was thus, That a man by indenture enrolled, bargained and sold his land in fee with proviso, that if the vendor before such a day should pay to the vendee, *his heirs or assigns*, one hundred pounds, then the bargain and sale should be void; * The vendee made his executors, and died before the day, and the vendor before the day tendered the money to the executors, without any tender made to the heir, &c. And whether this tender be good and legal, or not, *quære*. And A. BROWNE and I thought that the tender is not good, because it is contrary to the express words in the condition; for the executor is not assignee of the vendee, because he has nothing in the land: and although by *Littleton*, in his chapter of Estates conditional, [§. 339.] if no mention had been made of the heir, executors and assigns, of the feoffee or vendee, the tender at the day may be well made to the executors, because it is intendable that the feoffee or vendee lent the money to the vendor, and so *quasi* a debt to the testator; yet where the *heir or assignee* is expressly appointed and limited in the condition, *Littleton* himself says that the tender ought not to be made to the executor; and the reason is, as I believe, because the law does not determine to whom the tender shall be made, when the parties themselves are agreed expressly to whom the tender should be made: yet *quære* well thereof, because WESTON, CATLYN, *Chief Justice*, and SAUNDERS, *Chief Baron*, held the contrary strongly. And the words of *Littleton* well considered and weighed, I believe as above. *Ideo sit liber judex.*

(50) *Hil. 33. El. C. B. Rot. 904.* In debt by *Richmond* against *Butcher* [Ow. 9. Cro. El. 217. 2. Leon. 214.] A man makes a lease for years reserving rent to him, *his executor, and assigns, during the said term*, the lessor died, his heir who had the reversion brought debt, and *per Cur.* it does not lie, because by the words the intent of the lessor appears otherwise. [See Mr. Hargrave's note (S) to Co. Litt. 47. a. 5. Com. Dig. 422, 423. and Bac. Ab. Rent. (H).]

Moody's Case. In Cur'. Ward'.

Tenant in capite by knight-service makes a feoffment to himself for life, remainder to his

(51) RICHARD Moody tenant in capite in fee-simple made a feoffment to the use of himself for the term of his life, remainder to his wife for her life, remainder to

to his second son in tail, remainder to his third son in tail, remainder over to the heirs of the body of his eldest son, and for default of such issue remainder to the right heirs of his eldest son for ever, and died; and this estate was executed in his life in the time of *Edward 6.* the eldest son being within age at the time of the death of his father; and afterwards an office of this was found of all the case above. The elder son died without issue, the wife died, the third son also died without issue, the second son being within age; whether he shall be in ward for his body or for his land, or neither of them, was the question. And *CATLYN*, *Chief Justice*, *DYER*, *SAUNDERS*, *Chief Baron*, the *ATTORNEY*, *SOLICITOR*, *KAYLEWAY*, and others, thought it clear by the common law that he should be out of ward, but by the intent of the statute 32. *H. 8.* [c. 1.] which makes new law in the saving of the wardship of the body, and the third part where the disposition is made for the advancement of the wife, preferment of the children, payment of the debts, or otherwise, s. to any charitable use, and especially where any estate of inheritance is disposed of to any child, although the fee-simple be entailed to a stranger; but where only an estate for life is disposed of among the children, the remainder over to strange blood, it is not so clear. And so by *KAYLEWAY* the usage and course has been in * the court of wards since the making of the statute. And so this case at last was ordered, for otherwise such fraudulent practices would oust the queen of her wards, &c.

second son in tail, remainder to a stranger in fee, on his death the king is entitled to the wardship of the body, and third part of the land.

9. E. 4. 18. Inft. 78.
33. H. 6. 14. 6. Co.
76, 77. Sir Geo. Cur-
son's case. 27. H. 8. 7.
11. H. 7. 19. Dy. 9.
130. 137. 235 172. 27.
H. 8. 26. Dy. 252.
193. 354. 2. Co. 94. 2.
Bingham's case.

Conveyance to any of the collateral blood who is not his heir apparent is not within the acts of 32. and 34. H. 8.

6. Co. 77. Inft. 78. 8.
Co. 164. 9. Co. 12.
Post. 361. b.

* [181. b.]

[By 12. Car. 2. c. 24. wardship abolished.]

Fifth against Broket.

(52) *GEORGE Fish* brought a *formedon in descender* against *Edward Broket* for lands in *Welwin* and *Codicote*, supposing by the writ that *T. Fish* gave to *George Hide* and others and their heirs, to the use and behoof of the said *T. F.* and the heirs of his body lawfully begotten, and that after the death of the said *T. F.* and *E. F.* the son and heir of the said *T.* they ought to descend to *G. F.* as brother and heir of the said *E. F.* by form of the gift aforesaid, &c. and counted upon a deed of feoffment to the use above made before the statute 27. *H. 8.* [c. 10.] and by the same statute that *T. Fish* was seised in tail of the land according to the use &c.

HERTF.

Trin. 3. Eliz. Rot. 945.

If one of the proclamations of a fine be stated to have been made on a day out of Term, or on an impossible day, it may be avoided by pleading; but if stated to be on a day in Term, which day was a Sunday, it must be reversed by error.

[1. For. Plac. 155. S.C.]

Plow. 265. 2. S. C.

B. N. C. 17. Hob. 30.
[Palm. 255.]
M. 1. and 2. El. Rot.
1226.

Dy. 154. 168.

[Cruise on Fines, 44.
3. Burr. 1596.]

Dy. 277. Bro. Forme-
don, 46. Plow. 59. Bro.
Action sur le Case, 47.

The tenant pleaded *actio non*, because as to parcel of the tene-
ments, he says that heretofore, s. on the octave of *Saint*
Michael, in the second and third year of king *Philip* and
queen *Mary*, a certain fine was levied &c. between the tenant
the plaintiff and the said *E. F.* deforciant of the same tene-
ments by name agreeing in number and quantity with the
acres and parcels in *Welwyn* and *Codicote* and *Parva Ays*,
whereof a plea &c. and acknowledged *come ceo que il ad de*
son done, &c. and pleaded all the concord, and moreover
pleaded the proclamations according to the form of the
statute, &c. and shewed the certainty; whereof one was on
the 7th day of *June* in *Trin. Term*, &c. and a *prout patet*
by the record of the fine remaining in the said court, with an
averment that the fine was levied to the use of *Broket*, &c.
by virtue of which fine the tenant entered; and as to the
residue, he pleaded another fine between the same parties as
above, agreeing with the number and quantity in the residue
by their names with the appurtenances in *W. C.* and *Ays*
Mount Fitzhet, whereof a plea &c. (53) And this fine was
upon the morrow of the Trinity, in the years aforesaid, with
the proclamations as above, shewing the certainty of the days
in the four Terms, and that the thirteenth proclamation was
made on the 22d day of *June* in *Easter Term*, in the 3d and
4th year of *P. and M.* and the fourteenth on the 25th of
June in the same Term, and the fifteenth on the 28th of
June in the same Term, and the sixteenth on the 31st day of
June in the same Term, &c. as above. To which the
plaintiff replied *præcludi non*, because he says that the said
several fines in the bar of the said *E. B.* were not proclaimed
according to the form of the statute of the 4th *H. 7.* [c. 24.]
nor were either of them; for he says that the thirteenth
proclamation in the first fine was supposed to be made on the
7th day of *June*, that the said seventh day was a *Sunday*, and that
Sunday is not, nor then was a day in bank, or *dies juridicus*;
and that no day of *Easter Term* was in *June*, as is supposed by
the second fine and proclamation; and shewed the commence-
ment of the said Term, and the end to be on the last day of
May, &c. And to this replication the tenant demurred in law.

And^d the first exception was taken to the writ, because
it is special, and also for any thing contained in the writ
the donor and donee in use might have died before the sta-
tute, s. seized of the use in tail only, of which no formedon

can be, and that the writ ought to have made mention expressly of the statute of 27. H. 8. as well as the count. And clearly this had been better; * for such a precedent was shewn by WHETLEY, *Prothonotary*, and this was done by good advice: but the Court held the other writ well enough; by the intendment of the words of the writ; "*and which after the death of the father and Edward the son and heir, &c.*" which is intended seisin of the land &c. And also the special writ devised upon this case as if the entail had been made by parliament, or by reservation of a reversion by the conuser of a fine in tail as appears in 14. H. 4. [31. a. pl. 43.] in a good formedon, was holden well enough. (54) Also it was moved by CHOLMELBY for the tenant, that the replication was not formal, because it does not divide it into two parts; s. to answer to the matter in each bar, but has confounded them together with one answer: and it was the opinion of the Court that this would be better pleading; but the other that trenches to both the fines and proclamations is good enough, because the defaults in effect are apparent, &c. And it was moved besides, that there were in the bar two defects, s. one, because it does not allege in fact that at the time of the fine levied the conuser was seised of the land, nor the conusee, although the fine supposed an estate precedent; because the fine was *come res que il ad &c.* for when he has concluded with the fine and proclamations, he says, by virtue of which fine he entered into the land; therefore he was not seised of it before; and then it appears that the parties to the fine had nothing at the time of the fine levied. The other was, because the fine supposes the land to be as well in *Ayot* as in the two villis named in the formedon, s. *Welwyn* and *Codicote*, and then that is not fully answered in bar without an express averment taken that all the land lay in the two villis only, &c. But the great doubt of the matter in law was, whether the fines with proclamation made as above, are voidable by plea made in this court as above; or whether the proclamations shall be reversed in *B. R.* by error. (55) And as I think one of the fines in which one of the proclamations was made on a *Sunday* shall be reversed by error, because it is error in fact; and triable *per pais* or by the calendar; s. whether the 7th day of *June* was a *Sunday* or not. And because the Court has recorded this proclamation to have been made in *Trinity Term*; s. on the 7th day of *June*,
 L 1 4 which

Bro. Formedon, 9.

Dy. 156. b. Bro. Tylb,
11. 42. E. 3. 5. and 9.

27. H. 8. 4. Dy. 491.

Flow. 268 B.

[Crise on Fines, §10.]

[2. Black. Rep. 1086.
3. Black. Com. 333.]1. Rol. Ab. 524.
33. H. 6. Error, 42.

which day in truth was within that Term, and well might be a day in bank, and *juridicus* if it had not been a *Sunday* in that year, therefore this is error in the court reverfable by writ of error in *B. R.* and not in *C. B.* But for the other fine, *s.* where the proclamations were made in the end of the month of *June* in *Easter Term*, and the laft proclamation of it is on the 31ft day of *June*, this is void, and *quafi coram non judice*, becaufe it is impoffible to be true, for never to this time was there fuch a day, namely the 31ft day of *June*, fince *June* has * only thirty days: and befides *Easter Term* was never fo late in *June*, nor ever will be, without parliament; wherefore it feems that thofe proclamations are utterly void: and then there were not there fixteen proclamations according to the ftatute 4. *H. 7.* [c. 24.] and then this fine is not a bar in formedon, but the other is a bar until it be reverfed by error. But *BROWNE* thought both fines void and infufficient for the above reafons; but *WESTON* thought them both good, until they are reverfed by error. And afterwards in the end of the Term, judgment was given for the demandant againft the tenant for the tenements comprized in the faid fine; and as to the firft fine *Cur' adv' vol'*. And afterwards this was reverfed in the proclamations in *B. R.* and then *quere* what may be done in *C. B.* upon the demurrer to it, &c. But at length the whole controversy was compounded, and for twenty-four pounds *Broket relifta verificatione cognovit actionem.*

* [182. b.]

[Cruise on Fines, 44.]

Plov. 265.

Post. 210. 2.

In *B. R.*

The fheriff may not difavow his return of a panel after the term of the return, although he did not difcover fooner that the melfenger by whom it was fent had changed fome of the jurors at the plaintiff's request. And though this be good caufe of challenge, it is not to the array.

Jenk. Cent. 3 c. 71. S. C.

(56) **T**HE array of the grand jury in attaint was well and duly made by the fheriff, and he delivered the writ with the panel annexed to it to the plaintiff himfelf to take counfel in the formal return of it: and before the return the plaintiff delivered it to a man who was a melfenger, to carry with divers other writs to the courts here at *Westminster* on the faid day of the return of the attaint, but no truft or command was given to him of this writ of attaint: and the faid man by the information of the plaintiff, who difliked di-

(56) *Hil. 37. El. B. R.* [Co. El. 512. Moor. 431.] *Palmer v. Marfo and Potter* the late bailiffs of *Northampton*, whence they were removed on *Friday* after *Michaelmas*, and the return was on the *Friday* after the octave of *St. Michael*, this cannot be their return, and fo it was adjudged, and an action on the cafe brought againft them for a falfe return, and adjudged for the defendants.

vers of the polls of the panel, and prayed him to return others in their places at the nomination of the plaintiff, did so: and the return was so accepted: and just then this sheriff was removed, and a new one elected, to whom the re-summons was directed, and afterwards a distress, which writs were returned accordingly; and now came the former sheriff and disavowed in court the said panel, because it was altered as above. And whether he may do this two or three Terms after the return of it, or whether the array may be challenged by the defendant in the case aforesaid, where no default, favor, or corrupt intent was in the sheriff or his ministers, the Judges were much in doubt, and therefore JUSTICE CORBET was sent into the bench to sound their opinions: and they thought that the old sheriff came too late to disavow the array or return (which he might well have done at any time in the Term of the return) for the inconvenience &c. and also that the two triors who shall be assigned cannot disaffirm or quash the array which was well and lawfully made at the time of arraying the panel. But clearly the polls may be well challenged for the default of those who were put in on the nomination of the plaintiff. Yet the matter was deferred till the morrow, and then the other bench was of the same opinion. But SAUNDERS, Chief Baron, hesitated a little in the disavowal. And afterwards the matter was compromised.

37. H. 6. 12.
Br. Return de brief, 57.
Dy. 177. a.
Dallison's Rep. 45.

21. Aff. 26. 21. H. 7.
29. a. 49. E. 3. 1. Bro.
Challenge, 25. 21. E. 4.
74. b. 7. H. 4. 10. a.
14. H. 7. 1. b.

* [183. a.]

(57) **B**ARON and feme being possessed of a term in right of the wife as executrix of her first husband, a stranger pretending title to the said term, the husband sub-

HEREFORD.

A woman being possessed of a lease as executrix of her husband marries B. who subma-

(57) In the case of *Fressou v. Exre*, [2. Leon. 104. Cro. El. 223.] upon evidence it was agreed that if there be a controversy between two on a lease for years, and they submit themselves to the arbitration of some one upon it, and the arbitrator awards which shall have the term, that is a good gift of the interest of the term. See 12. Aff. 25. But if the award be that the one shall permit the other to enjoy the term, that does not give the interest of the term, *East. 23. Eliz. B.R.* And in this case the arbitration shall bind the wife, for if the husband had granted over the term that grant would bind the wife, and by consequence the submission in this case being for the title and interest in the term, is as much in effect as if the husband had granted over the term, and it had issued from him, in which case the wife had been bound without doubt; and so accordingly it was taken by SERJEANT HARRIS at the assizes in *Wales* as JUSTICE JONES said, and he said that LORD ANDERS ON was of the same opinion: but if the arbitrators award that the possessor shall hold the term, that it seems does not bind the right of the other, for their arbitration does not extinguish the right then, as it does to pass the possession in the other case. [3. Bac. Ab. 421. 1. *Ld. Raym.* 114. That the husband may dispose of the term, 2. *Black.* 801. 3. *Wilf.* 277. See *Kyd on Awards*, 39.]

† Orig. *Come si le Baron ad grant ouster le terme est issuit de il in quel case le feme ad estre en est double et accord d'uis pris per Serj. Harris.*

mitted

the interest and title to arbitration, and a moiety only is awarded to them, whether this binds the wife.

It cannot be given in evidence under the general issue in detinue by the wife for the lease.

Dy. 7. a. 1. Ro. Abr. 245. (D.) 1. 9. Co. 85. b. 33. H. 6. 3. 21. H. 7. 29. b. 6. H. 7. 11. b. Dy. 264. b. Keilw. 122. a. 9. E. 4. 42. b. Arbitrement, 43. 14. H. 4. 19. 2. Keb. 735. Dy. 41. a. 196. 276. a. 305. 12. H. 8. 1. Bro. Arbitrement, 13. 53.

mitted it to arbitration by writing for the interest and title of the lease. The arbitrator awarded one part to the pretender, and the other part to the husband and wife. The husband died: Whether the wife is bound by this award *quære*, in the circuit of Lord [Chief Baron] SAUNDERS upon evidence at *nisi prius*. And note the issue was *non detinet per patriam*, in detinue for the indenture of the lease. And at length judgment was given by the Court for the plaintiff, because the special matter ought to have been pleaded in justification of the detinue, and not the general issue as above; and so *quære* of the matter in law above.

LINCOLN.

Avowry, that the place where, is parcel of the manor of K. defendant's freehold. Plea, that it is parcel of the manor of K. and makes title to it, without this that the said manor of K. whereof &c. is defendant's freehold. Plaintiff is estopped from shewing that defendant has no such manor, and that then the place is not parcel, for his plea admits it.

Dy. 142. a. 208. 6. H. 7. 3. 43. E. 3. 9. 9. Co. 47. Dy. 196. Dy. 23. b. 122. b.

[2. Lutw. 1216. Bull. Nl. Prius 298. 5. Term Rep. 3.]

(58) **I**N replevin, the taking was supposed in a certain place called *Kelfstornlyng*; the defendant says, "*that the said place contains two hundred acres of pasture, which are and by prescription have been parcel of the manor of Kelfstorn, (without shewing in what county the manor lies,) which manor is and was the soil and freehold of him the defendant,*" and avows for *damage feasant*; to which the plaintiff says, "*that the said place was parcel by prescription of the manor of Kelfstorn in Kelfstorn aforesaid, and conveys title to himself of the said manor, ABSQUE HÔC that the said manor of Kelfstorn whereof &c. was the soil and freehold of the said defendant &c.*" upon which they were at issue; and at the last assizes at *Lincoln* it was given in evidence by the plaintiff that the defendant had not any manor of K. and then the said place of two hundred acres was not parcel. And by the opinion of the Court at the assizes, and also now in bank, this evidence is repugnant to the *absque hoc*; for by that it is confessed that K. is a manor, and it cannot be understood the manor of K. of which the plaintiff speaks in his plea, but of necessity the manor of which the defendant had spoken before in his avowry. And also the word *whereof* implied that *Kelfstorn* was a manor, wherefore &c. But the good and prudent form had been to say, *protestando* that the defendant had no such manor called *Kelfstorn &c.* but for plea to say, that it was parcel of the manor of *Kelfstorn* in K. to which the plaintiff conveyed title, without this that the said two hundred acres

of pasture were the soil and freehold * of the said defendant, according to 36. H. 6. [18, 19.] and 7. H. 7. [8. a. pl. 13.] in a writ of entry upon the statute [5. R. 2. ft. 1. c. 18.]

(59) A MAN is indicted of the robbery of another in his dwelling-house, he being in the said house, and put in fear; and another is indicted because he feloniously before the said robbery procured and counselled the principal to commit the robbery, in which indictment of the accessary this word "*maliciously*" is omitted. Whether the accessary by 4. and 5. P. & M. c. 4. shall be put to his clergy for default of this word "*maliciously*" *quære*. And it is to be considered whether this word *maliciously* be referred to petty treason or murder, in which there may be malice in the procurement and no malice, and not to the robberies, in which there is not commonly malice, but rather covetousness to have the goods. And by the opinion of all the Judges of assize in their assembly except the CHIEF JUSTICE and A. BROWNE, for default of this word *maliciously* in the indictment the party shall have his clergy, because the word *maliciously* refers as well to robberies as the voluntary burning of houses; and the subsequent words in the statute confirm this. Weigh the words themselves of the statute.

In an indictment against the accessary on 4. & 5. P. & M. c. 4. the word *maliciously* is necessary, or the offender shall have his clergy, as he might before that statute. Jenk. Cent. 5. c. 72. S.C. 11. Co. 37. a. 58. his clergy shall be allowed. Post. 363. 25. Raft. Clergy, 26. [2. H. H.P. C. 339, 342. a. Hawk. P. C. 480.]

Hal. Pl. Cor. 231.

5. E. 6. 69. a. 18. E. 4. 10. b. Dy. 186. b.

A similar case happened in the 18th year of the present queen; for a servant of *Dame Laxton of London*, widow, for procuring feloniously the robbing of his mistress by one *Crompton*; but in the indictment were wanting, "*commanded, hired, and counselled,*" and also "*maliciously,*" and yet clergy was allowed him after judgment, by the opinion of the Judges.

(59) If breaking of a house by night † [no] felonice being put into the indictment nor any entry made into the house, and upon the evidence the intent of the party appeareth to be felonious, and some also to be within the house, yet the indictment is insufficient; and if *burglariter* were in, the clergy shall be allowed, unless the indictment made mention of somebody being in the house.

If one sojourn or lodge in another's house for a time and is robbed by night in the same house the thief shall have his clergy, for that the statute is, "where any one is robbed in his house," so the owner of his house must be robbed. These questions were moved *Trin. 3. and 4. Pb. & Ma.* among the Justices for all circuits. [1. *Hale*, 522, 523. but see 2. *Hawk.* 499. *contra.*]

† In orig. the word *no* is omitted, and the other word is *felony*; thus, *felony being put, &c.*

In account by executors of a receipt by the hands of the testator, defendant cannot wage his law, because that is by other hands.

T. 1. El. Reg. Rot. 627.

2. Rol. Ab. 110. 1. Inf. 295. a. Went. 145. 18. H. 8. 3. a. 21. 33. H. 6. 23. 8. 13. H. 7. 3. a. 10. E. 4. 8. a. 5. 10. H. 7. 4. b. 10. Eliz. 265. a. 13. H. 4. 8. 15. E. 4. 6. 17. E. 2. Ley. 71. 14. E. 2. Ley. 69. 2. H. 5. 2. 14. E. 3. Ley. 48. 5. E. 3. 21. Ley. 54. 47. E. 3. Ley. 95. 7. 46, 47. E. 3. 47. a. 10. b. 16. [8. Mod. 303. Salk. 683. 12. Mod. 679.]

(60) **I**N account by executors of a receipt had of the hands of the testator, the defendant waged his law that he never was receiver of the money of the testator : and now he came to make his law, and in making it the Court saw into this case, because by other hands &c. and therefore he was stopped. As it seems by the opinion of *M. 7. E. 3.* [61. pl. 52.] law does not lie in this case, because it is by other hands ; but there the receipt was supposed, part by the hands of the testator, and part by the hands of others, and for all the defendant pleaded *ne unques son receiver per pais &c.* And afterwards in the first case by the opinion of the Court, the defendant pleaded to issue of the country.

(60) *M. 42. 43. El. [Cro. Eliz. 790.] Ellen Sheffield* brought account as executrix of her husband against *Barnesfield*, and counted against him as common bailiff of her husband, of the receipt of northern kerseys to merchandize : and *HARRIS* moved that he might wage his law, inasmuch as the receipt was by the hands of the testator only. *WALMSLEY* thought that he could not wage his law, for it has been several times ruled in *B. R.* and also here in *C. B.* that a common bailiff cannot wage his law, but otherwise it is of a receiver, to which the other Judges assented. *DANIEL*. "Bailiff of land shall have allowance upon his account, but it is otherwise of a bailiff of goods, and so see the diversity." *WALMSLEY*. "That is true." Wherefore the Court advised the defendant to plead that he was not his bailiff.

* [184. a.]

Dauntsey against Southwell.

Lease of lands by H. 8. except trees, Ed. 6. grants the reversion and the trees to the duke of *N.* who leased to *C.* the lands and trees without impeachment of waste. The duke is attainted of treason, and queen *M.* grants the inheritance to defendant, who infeoffs the plaintiff, and binds himself to indemnify him against any claim of *C.* by virtue of his lease. *C.* sells trees. In an action on the bond, and *non damnificatus* pleaded, the replication must shew that *C.* claimed by virtue of his lease, and

(61) **K**ING *H. 8.* made a lease for years to one *Matthew Colthurst* of certain lands and tenements called *Bretons* in *Sevenoke* in *Kent*, except the large trees and woods there growing and being. And afterwards king *E. 6.* granted the reversion and also the trees and woods to the duke of *Northumberland* in fee ; and he made a lease to *Culpeper* for a term of years, as * well of the lands and tenements, as of the trees and woods without impeachment of waste : And afterwards by the attainder of the duke, the fee came to the hands of queen *Mary*, who granted it to *Southwell* in fee, and *Southwell* sold them to *Dauntsey* in fee, and bound himself by obligation indorsed with condition that he would make assurance of it before a certain day, and that he would warrant, defend, or save harmless as well the person of *Dauntsey* as the premises,

(61) *Trin. 32. El. B. R. Rot. 71. Foster and Wilson v. Mabb, [Cro. Eliz. 213. Ow. 100. 1. Leon. 324.]* Lessor covenants with lessee to save him harmless and indemnified against *B.* If *B.* enter, whether it be by tort or title, the covenant is broken. Not undamified in the covenant. [1. Str. 400. 1. Term Rep. 671. 1. Hen. Black. 34. 3. Term Rep. 584.]

and

and every part of them against *Culpeper*, for and touching any interest, claim, or title to be made to the same premises or any part thereof by the said *Culpeper* BY VIRTUE OF THE SAID LEASE. And afterwards, the first term continuing, *Culpeper* claimed the trees aforesaid, commanding one *Kynge* to fell and carry away three great oaks growing in the said tene-ment, and *Kynge* did accordingly: Whether this be a breach of the condition aforesaid was the demurrer. And the bar was pleaded for the second part of the condition, that by reason of the existence and continuance of the first lease which is pleaded in certain (without saying any thing of the exception of the trees), neither the obligee, nor the premises, or any part of them, can or could be damnified by the said *Culpeper* for and touching any interest, claim, or title to be made by virtue of the said lease to him thereof made &c. And the plaintiff in his replication shewed all the other matter above, but he did not conclude in fact that the claim of *Culpeper* to the trees was by virtue of his lease aforesaid, nor before the suing out of the writ, &c. Also he made no conclusion with a *sic damnificatus*, nor left all the matter above to the Court to adjudge upon the breach of the condition, comprehending damage as well to the person as to the land, which seems double; *quare inde*, Whether one can be damnified without the other. And besides he did not shew in pleading, that *Ed. 6.* was seised as well of the trees and woods at the time of the granting of the reversion, as of the reversion, but only seised of the reversion, and “by virtue whereof the duke of Northumberland was seised as well of the trees and woods as of the reversion as of fee;” when in truth the trees and woods were in him in demesne, (62) Also the condition of the obligation contains two parts copulative to be performed; and although defendant ought to allege performance of both, yet plaintiff shall take issue upon one only: but yet it would be good and formal pleading that the plaintiff should take a protestation at the commencement of his replication to one of them, and for plea answer to the other; and if there are divers things in the condition, as three or more payments, the * protestation shall be, that he did not pay any &c. for plea answering to one of them at his election, which form is not observed here: and also order is not observed in the commencement of the replication, because it does not say that well and true it is that king *H. 8.* was seised &c. and yet *verbatim* it agrees with the

must conclude with *sic damnificatus*. But this is not a breach of the condition, for “without im-
“proachment of waste” cannot pass the trees, and then by virtue of his lease he could only claim the branches and fruit.

Mic. 1. & 2. Rot. 737.
[Bendl. 75. S.C.]
[Co. Ent. 137. b. S.C.]
Harper's Rep. fol. 1. a.
11. Co. 47. 4. Co. 62.
Co. Lit. 303. b.

1. Inst. 303. b.
Dy. 187. a. 258.

Diversity between al-
leging a breach of many
covenants in an incen-
ture which is good, and
alleging the breach of
conditions in a bond
which is bad. 7. H. 7. 3.
Dy. 297. b. 10. H. 7.
10. Com. 193. 27. H. 8.
4. Dy. 182. a.

[Bul. Ni. Pr. 161. -- 165.]

5. H. 7. 7. b. 2. R. 3. 16. a.
46. E. 3. 33. Finch. fol. 57.

[* 184. b.]

the making of the lease to *Colthurst* in manner and form as in the bar, but shews it as if it was foreign matter, adding to it the exception and reservation of the trees and woods, which is not mentioned in the bar &c. And as I understand the plaintiff ought to have alleged in fact in the beginning of the replication that at the time of the said demise made to the said *Colthurst* by king *Henry 8.* there were trees and woods growing in and upon the premises; for from this arises the matter of the breach of the condition, and the exception alone does not prove in fact, that there were any then there, but by implication and intendment only, which is not sufficient. (63) Also plaintiff does not convey any good conveyance to himself, nor is there granted in the bar any other assurance of the land to plaintiff except by indenture of bargain and sale only without inrolment, and without any livery or grant of the reversion and attornment of any particular tenant: and then it is not proved that the plaintiff was damnified, and then he has no cause of action. And besides it seems that the plaintiff in his replication does not meet the defendant: for the defendant has pleaded matter in bar to prove that it is not possible that the plaintiff or his lands could be damnified by reason of the continuance of *Colthurst's* lease, which is no plea, for he ought to have pleaded generally that he or they was not or were not damnified &c. for that is a performance of the condition, and not that they could not nor can be damnified. So if plaintiff had demurred to the bar, he should have had judgment to recover without saying more; but now the matter in this replication proves, that as well the plaintiff as his land was damnified by *Culpeper* in fact, and does not answer to the impossibility of the fact, as the bar makes it. And the matter in law was, Whether the large trees and woods above are as a chattel in the king or the patentee lord of the land, or remain always parcel of the land, notwithstanding the exception and reservation of them out of the lease of *Colthurst*; and Whether the property of the trees &c. was in *Culpeper* immediately by this word *demised* or *leased* without any words of grant; and also Whether he might have taken them if this clause *without impeachment of waste* had not been in the lease. See in *Statham Tit. Waste, M. 27. H. 6.* the opinion that the lessee without impeachment of waste shall not recover damage against a stranger who cuts the woods, only for the trespass on the land, and the branches

30. H. 8. Bro. Attorn.
ment 29.

2. Co. 4. 4 H. 7. 12. b.
Dy. 43.

Dy. 118. a. 242. b. 243.
b. 254. 4. Co. 18. b.

Dy. 140. 230. a. Plow.
138. 9. H. 6. 35. Bro.
Repleader, 39. 1. And.
168. Went. 85. 4. Co.
63. 3. Cro. 522. 5. Co.
11. 20. H. 6. 22. b. Dy.
113. b. 374. Plow. 104.

1. Ro. Rep. 96.

22. H. 6. F. Waste, 8.
11. Co. 83. 27. H. 6.
Statham Waste, 47. Co.
463. a. 11, 47. & 82, 83.
b. Plow. 184. 484.

branches of the woods; but STATHAM himself thought the contrary. See 10. H. 7. fol. 9. in a writ of entry upon the statute of 8. H. 6. [c. 9.] what manner of thing interest is, namely every sort of common is an interest, * and it is all one to claim the land, and the profits of the land.

(64) Note, WESTON and A. BROWNE concluded in their argument against the plaintiff for the substance and very matter in law, *s.* that there was no breach by the cutting of the trees, because it cannot be *by virtue of the lease of the trees*, because the thing leased is destroyed and determined by the cutting down, but if it had been only the branches or fruit of the trees it would be otherwise. But I was *contra*. But we all agreed that for the insufficiency of the replication, for the exceptions above, and chiefly for default of a conclusion with a *sic*, and these words, *s. by virtue of the last lease they claim the trees*, the plaintiff shall not recover but was barred. See for the conclusion of the replication with a *sic damnificatus* or *non fuit damnificatus* pleaded in bar a good precedent in 10. H. 8. &c.

12. E. 4. 8.
Dy. 187. 306. 375.

Plow. 15.
[5. Com. Dig. 233. 104.]

M. 1. El. Rot. 537. The replication adjudged insufficient. 18. Because it does not confess and avoid the bar. 2d. Because it does not shew the descent of the trees as well as of the land to E. 6. 3d. Because it does not shew that he claims the premises as well as the trees.

Thorne against Rolff,

(65) [N] dower by Margery Thorne against Rolff, the issue was taken last Term upon the death or life of the husband, and day given to each party to inform the court, *s.* to the demandant of the death of the husband, and to the tenant of the life by proofs *ut oportet*. And now in this Term the demandant brought two witnesses of the death, whereof one was the brother of her husband; who were sworn and examined by LEONARDE second prothonotary. And their testimony tended to no full proof; but by conjectures and presumptions, *s.* “because the husband departed the kingdom in the first year of queen Mary on account of his religion, and was a minister, and for these seven years has been absent; and in this time of this religion restored here, he is not come back, nor can any merchant of that country, *s.* of Germany,

BEARS.

Pach. 2. Eliz. Rot. 935.

In dower circumstantial proof of the death of the husband after seven years absence was admitted, none being offered to the contrary.

[Benl. 86.]

1. And. 20. } S. C.
Mo. 14.

8. H. 6. 23. a. 9. Co. 30. b.

30. 36. 39. 41. Aff. 26. 5.

9. 5. 12. H. 4. 17. b.

43. Aff. 26 B. Tryal, 36.

6. 9. 10. 17. E. 3. 29. b.

2. 46. a. 50. Bro Appeal,

137. F. Judgment 237.

This trial shall not be by

jury but by the Judges.

21. H. 7. 39. b. 3. H. 6.

34. a. 34. E. 3. Det. 164.

8. 26. E. 3. 56. b. 75. b.
7. H. 4. 11. Barre, 178.
5. E. 3. Stat. Annuity 14.

" or Englishmen who travel in those parts, tell of his being alive,
" nor is there any token of it; wherefore they conclude in their
" consciences that they rather think him dead than alive."

[3. Inst. 88. Bul Ni Pr.
118, 119. and see 19.
Car. 2. c. 6. Carth. 246.
and 6. Ann. c. 18.]

And these testimonies were entered *verbatim* upon the record before judgment was given; and no witness of the life of the man was produced upon the part of the tenants: therefore it was considered that the demandant should recover seisin &c. See in *cui in vitâ M. 2. E. 2. [24.]* where the death of the husband of the demandant was proved by four who agreed in all points, and at the day of the essoin the tenant produced twelve proofs of the life of the man, who also agreed in all points, which proof was holden stronger, wherefore the demandant was barred. (Also it was said) that *qui melius probat melius habet*. But by *Brañen*, this trial is not peremptory, but the tenant shall plead over to the right of dower: and he vouches a precedent of this in *Lib. 4. c. 7. fol. 301, 302.* where this is said, the *feffa* shall be received for proof by witnesses.

9. E. 2. Judgment, 231.
2. E. 2. Tryal, 46. 8. E.
2. Tryal, 95. 19. E. 3.
Tryal, 58. 35. H. 6. 44.

Notes upon Fortescue,
c. 21.

In 28 *El. 4* in the case of one *Serle*, it was argued by the Judges of *C. B.* whether the issue of priests were legitimate, and *POPHAM, Attorney*, said it was adjudged when he was a serjeant, that the wife of a priest should have dower. [See 2. & 3. *Ed. 6. c. 21. 5. & 6. Ed. 6. c. 12.* both these were repealed 1. *Mari. scil. 2. c. 2.* but restored and made perpetual by 1. *Jac. 1. c. 25.*]

* Trinity Term,

* [185: b.]

2. Queen Elizabeth.

Adjourned on the Octave of the Trinity.

Woodward *against* Chichester, Executor &c.

(66) **D**EBT was brought by *Woodward* against *Sir John Chichester*, knight, executor of the testament of *Th. Windham*, executor of the testament of *Sir Jo. Luttrell*, knight, and he counted upon a bond of the first testator. Defendant pleaded, that the said *Jo. Luttrell* the first testator was indebted upon a statute staple in one hundred pounds to the said *Windham*, and that after his death goods to the value of one hundred pounds came to the hands of *W.* as executor of the said *L.* which goods he administered, and paid himself by way of retainer; and beyond the said goods to the value of one hundred pounds, that the said *W.* in his life fully administered all the goods of the said *Sir J. L.* and so *riens in mains* of *W.* And plaintiff averred assets in the hands of *W.* of the goods of *L.* beyond the one hundred pounds at the time of his death to be administered in *London*; and by *nisi prius* at *Guildhall* last Term, or in *Hilary* Term, the issue was found for the plaintiff, s. that *W.* at the time of his death had divers goods which were of *L.* at the time of his death in his hands to be administered (a). But *SOUTHCOTE* moved there, that this issue was a jeofail, because *Chichester* answers nothing of the administration by himself of the goods of the first testator since the death of *Windham* his testator; for it may be, although *W.* administered all the goods which came to his hands, or that no goods came to his hands, that yet *Chichester* might have come to divers goods by seisin, or by action, which he ought to administer, therefore the an-

The executor of an executor to an action on a bond of the first testator, pleads that his testator *plene administravit*; the jury find assets at the time of his death: judgment shall be *de bonis testatoris*, and the damages *de bonis propriis*: and on a *discoffament* returned, an execution generally *de bonis propriis*; whereon if *nulla bona*, plaintiff may have a *capias* or *legit.*

This retainer of the executor for satisfaction of his own debt is allowed to be good in *Plowden's Commentaries*, f 184.

21. E. 4. 28. Dy. 160 b.
20 H. 7. 4. 13. H. 8.
15. 31. E. 3. Execut.
82. Went. 128. Post.
187. b. 11. 12. H. 4.
83. 21. b. 21. E. 4. 3.
Dy. 174. b. 12. H. 8.
Keil. 22. 23. H. 8. 99.
40. E. 3. 15. 9. Co.
74. b.

[Ante, 174. b. pl. 21.]

(66) *ϕ 7. H. 7. 39. a. 11. H. 6. 35. [pl. 27.] accord*; but 3. H. 6. [3, 4. pl. 4.] *cont* by *Martin*; and so it was adjudged in *ϕ Gun and Noble's Case*, *M. 4. Jac.* in *B. R.* that the plaintiff ought to shew in his replication what goods came to the executor after the death of the testator, or otherwise give it in evidence: and there it was said, that there were an infinity of precedents in both courts which warrant this kind of pleading. And note the pleading in *Meriel Threbbam's Case*, 9. Co. 108. and *Keilway*, 61. b.

(a) Upon a special *plene administravit*, if assets are proved in the defendant's hands, he may give evidence of other payments

with them prior to the writ sued out. 2. Black. Rep. 1105.

14. 17. E. 4. 8. 9. H. 7.
 15. a. 1. R. 3. 3. Plow.
 440. 21. H. 6. 1. Noy,
 120. 11. 21. 31. 33.
 34. H. 6. 8. 40. 13. b.
 23. b. 23. a. 8. Co. 134. a.
 18. 46. E. 3. 20. 10. a.
 a. 6. 7. 8. 4. 4. a. 1. 9. a.
 Dy. 324. 9. 14. 15. H. 7.
 15. a. 29. 8. b. 21. H. 7.
 Cro. 61. Went. 241.
 Dy. 175. a. 210. 28.
 H. 6. 3. 40. E. 3. 15.
 5. Co. 32. Bro. Execut.
 51. 11. H. 4. 70. 15.
 21. H. 7. 15. a. 19. b.
 17. 18. E. 4. 4. b. 11. b.
 34. H. 6. 20. a.
 Mo. 23. [3. Cro. 102.]

9. 11. H. 4. 6. 5. 27. 30.
 50. E. 3. 89. b. 28. 4. b.
 1. 5. E. 4. 41. a. 31.
 E. 3. Proccs 32. 45.
 E. 3. 19. Proccs. 57.
 Execut. 132.

[Mo. 299. a. Leon. 188.]

* [186. a.]

swer above was not full or perfect. And this is true as it seems. But the above exception was not allowed at the day of *nisi prius* by reason of the comimon usage and course of it to disallow such exceptions at *nisi prius*. (67) But now it was doubted what judgment should be given; and at length by the advice of the Court judgment was given that the plaintiff should recover the debt against *Chichester* of the goods of *Luttrell* being in the hands of *Chichester* to be levied, and the damages of the proper goods of *Chichester*, &c. And if the sheriffs of *London* return *nulla bona* of *Luttrell* in the hands of *C.* they ought to return a *devastavit* in *Chichester*, and not in *W.* because it is found that *W.* had asssets of the goods of *L.* at the time of his death, &c. And note, that it was a long time before the sheriffs of *London* would return a *devastavit*, and that he converted to his own use, but however they did so; and thereupon judgment was given that the plaintiff should have execution of the aforesaid debt of the proper goods and chattels of the defendant; and such writ was awarded to the sheriffs of *London*, and upon that a *nulla bona seu catalla* of the defendant was returned, and a *testatur* that the defendant, *s. Chichester*, had an estate in the county of *Devon*, whereof &c. And upon this a general writ of *fieri facias* was awarded against him into *Devon*: and if a *nulla bona seu catalla* * be returned there, then the plaintiff may have a *capias* or *elegit* at his pleasure, as it seems.

Stat. 1. Mar. sess. 2. c. 7.
 by equity extends to cases
 where part only of the
 Term is adjourned.

Jenk. Cent. 5. c. 73. S.C.

2. Inst. 519. Raft. Fines,
 12. Plow. 371. Co.
 Mag. Chart. 519.

[Cruise on Fines, 43,
 44.]

(60) NOTE, That it was moved for a question among the Judges at *Serjeants' Inn*, Whether fines levied and engrossed in this Term shall be allowed to be as if proclamations had been made according to the form of the statute 4. H. 7. [c. 24.] by virtue of statute 1. Mar. [sess. 2.] c. 7. which only speaks of the adjournment of any Term; and in this Term the adjournment was only of part of the Term, *s. octab. quinden. et tres sept. Trin.* and not of the entire Term; and yet by the opinion of all the Judges the fine shall be allowed with four proclamations according to the intent of the makers; for here by reason that no proclamation can be made according to stat. 4. H. 7. because the Term has only two *dies juridicos*, it is as if the whole Term had been adjourned, and the statute is beneficial and profitable by equity; wherefore &c.

Michaelmas Term,

2. and 3. Queen Elizabeth.

[186. a.]

(1) **CARUS** moved this case, s. A man gives land at this day to two, *habendum* to them for the term of their lives, and the life of the longer liver of them, to the use of *A. B.* for the term of his life, without more; the two lessees die; Whether the estate of *A. B.* be determined or not? And the Court thought that the estate is determined, because the estate on which the use was created and raised was gone; wherefore &c. But *quare* whether the estate above was inade before the statute of 27. H. 8. [c. 10.]

Land is given to two, *habendum* to them for their lives to the use of *A.* for his life; if the two lessees die, the use to *A.* is determined.

5. Co. 9. a. 1. Cro. 245. Dy. 93. b. 192. b.

[Shep. Touch. 483.]

(1) *Mitch. 21, 42. El. Crawlye's Case, [Ow. 126: Cro. El. 721.]* Rent is granted to *A.* and *B.* during the life of *C.* to the use of *C.* *A.* and *B.* die. *Per QUR'*, The rent continues to *C.* for the use is vested by 27. H. 8. [c. 10.] and there it is said by *Walmesley* and *Anderson*, that if rent be granted to two for the life [of *J.*] if they die, living *J.* the rent is extinguished, for there is no general occupant of rent; but if they had granted their estate to *M.* there *M.* should have it, living *J.*

M. 7. Car. B. R. Younge v. Dymock, Land is granted to husband and wife to the use of the husband and wife and the heirs of their bodies begotten: Resolved, that it was an estate tail; and a diversity taken between that case and the case here in *Dyer*, because here the use is limited to a stranger, and the estate is expressly limited also to the two for their lives only: otherwise in *Younge's* case, and there it was resolved also that the word *use* is surplusage. 7. Cro. Car. 231. [Co. Lit. 41. b. Mr. Hargrave's note (3); & 275. a. Mr. Butler's note to 271. b. and see 2. Term Rep. 431. 444.]

Parker's Case.

(2) **MEMORANDUM**, That in the month of July last, at Cambridge, before **ROBERT CATLYN**, knight, Chief Justice of England, and **ANTHONY BROWNE**, one of the Justices of the Bench, Justices of gaol-delivery there, they caused to be made a certain indictment of the murder of a certain female infant immediately after its birth against the mother and midwife, and against one *George Parkgr*, who begot that child in adultery, as an accessory in the malicious procuring of the said murder before the birth, the tenor of which indictment follows in these words: "The jurors for our lady the queen present, that *Helena Millefant*, late of *Kirtline* in the aforesaid county, widow, being pregnant of a certain live child, on the 24th day of May in the second year of the reign of queen Eliz. &c. at *Kirtline* aforesaid

Proceeding before the birth the murder of an infant after the birth, is felony without clergy.

Dy. 285.

"said in the county aforesaid by the providence of God was in
 "labour, and brought forth one female live * child; and after-
 "wards one Jane Saway, late of H'additon in the said county,
 "widow, not having God before her eyes, but moved by the
 "instigation of the devil, at K. aforesaid in the county aforesaid,
 "said, with force and arms &c. of her malice aforethought,
 "on the said 24th day of May in the second year of the reign
 "of our said lady the now queen, about the 11th hour in the
 "forenoon of the said day, by the counsel, command, and pro-
 "curement of the aforesaid Helena, and in the presence of the
 "said Helena, made an assault upon the aforesaid live female
 "child, and with a certain knife of the value of one penny
 "which the said Jane then in her right hand held, the throat
 "of the said female child then and there feloniously did cut,
 "giving to the said female child one mortal wound in her
 "throat aforesaid, of which mortal wound the said female child
 "at K. aforesaid in the county aforesaid then and there in-
 "stantly died; and that the said Helena then and there felo-
 "niously was present, comforting, consenting to, and abetting
 "the killing of the aforesaid female child in form aforesaid;
 "and so the said Helena M. and the aforesaid Jane the
 "aforesaid female child of the r malice aforethought feloniously
 "and voluntarily did kill and murder, against the peace of the
 "said lady the queen, her crown and dignity, &c. (3) And
 "the jurors aforesaid further present for our lady the queen,
 "that G. Parker, late of K. aforesaid in the county aforesaid,
 "yeoman, on the 19th day of May in the second year of the
 "reign of the said queen, and on divers days and times before
 "the felony and murder aforesaid in form aforesaid, at K.
 "aforesaid in the county aforesaid, maliciously and feloniously
 "counselled, commanded, procured, and abetted the aforesaid
 "H. Millecent the said voluntary murder to commit, and to kill
 "and murder the said female child, against the peace of the
 "said lady the queen: and further that the said G. P. and
 "Alice Biby, of K. aforesaid in the county aforesaid, spinster,
 "after the murder and felony aforesaid in form aforesaid com-
 "mitted, knowing that the said H. M. and J. S. the felony and
 "murder aforesaid in form aforesaid had done and committed,
 "the said H. at K. aforesaid in the county aforesaid, on the
 "27th day of the month of May aforesaid feloniously received,
 "aided and comforted, against the peace &c." And upon
 this indictment the mother and midwife were arraigned and
 condemned,

1. E. 3. 24. Dy. 183. b.
 4. 5. M. Rast. Clergy,
 26 7. Co. 1. a. Plow.
 4-6. Dy. 144 3 Aff. 2.
 22. Aff. 54. Dy. 128. a.
 Staud. 21. C.

condemned, and *Parker* also as above; and although he was a clergyman, yet he was hanged for the procurement aforesaid. Note, The procurement before the birth holden felony continued after the birth, and until the murder was perpetrated by reason of that procurement.

[1. H.H.P.C. 433. 2. Haw.P.C. 121. 2. Haw Pl. C. 446.]

(4) **I**N DEBT upon bond indorsed with a condition to save the plaintiff harmless against a stranger from a bond in which the plaintiff with the defendant was bound to the stranger at the request of the defendant; defendant pleaded generally that the plaintiff was not damnified; and the plaintiff replied, that after the obligation made to him, and before the writ purchased, the said stranger levied * against him a plaint of debt in *London* before the sheriffs upon the said specific obligation in the condition, and upon it had judgment to recover; and shewed the process in certain, and took an averment that the obligation upon which the recovery was had, and the obligation mentioned in the condition, were all one, and not different, and concluded his plea with a *sic damnificatus, &c.* Note this for the "*sic*." And the defendant rejoined *nul tiel record*; and a day was given to the plaintiff to have the record on such day at his peril; and the same day was given to the parties. And at the day the king sent the transcript or tenor of the record to the Justices of the Bench by a *mittimus* out of chancery of the tenor of the record only. And upon this certificate of the tenor, notwithstanding the aforesaid judgment, s. "*that he should have the record here*," the certificate was allowed, and upon this the plaintiff recovered. And note, the Court of the Bench did not write as above to the said Court which was inferior, but gave day to plaintiff to have it at his peril. *Sed quare*, if he had required this.

In C. B. on the issue of *nul tiel record* of the sheriff's court, where a day is given to bring in the record, it is sufficient if a transcript be sent by *mittimus* out of chancery; the record itself need not be removed.

18. E. 4. 27. b. Bro. Condition, 165. 21. E. 4. 75. 2. 5. Co. 24. a.

* [187. a.]

Dy. 184. a. 185, 188. a. 306. Plow. 15. Bro. Record, 66.

[3. Salk. 296. Br. Monstrans, 50. 2. Hawk. P. C. 420. 2. Com. Dig. 22.]

Dy. 236. b. 250. 254. 7. 34. 39. H. 6. 1. a. 2. a. 4. a. 27. Aff. 1. 4. Car. Cro. 28. 4. 19. H. 6. 24. 19. a. 13. H. 7. 22. 7. H. 4. 37. 28. H. 8. 32. b. 4. H. 6. 23. b.

(4) *M.* 36, 37. *El. B. R. Rot.* 573. [*Ow.* 19. *Cro. El.* 369.] *Betwright* brought debt on bond against *Harvey*: the condition was, that if the defendant acquit, discharge, and save harmless the plaintiff in the obligation in which he was bound with the defendant to *J. S.* in sixty pounds, that then &c. The defendant says, that *Betwright* was sued by *J. S.* upon this obligation, and upon *nil dicit J. S.* had judgment to recover, and that defendant before execution delivered to plaintiff sixty pounds. *Per Cur'*, This is no plea; and plaintiff had judgment.

Two joint-tenants for life, one leases his moiety for years rendering rent, and dies; the term continues, but the rent is gone.

7. Co. 96. a. Co. Lit. 185. Finch. fol. 4. b. Plow. Quer. f. 55. b. 27. H. 6. Stat. tit. Recognizance. Dy. 69. a. 103. 122, 123. 36. H. 8. Bro. Leases, 58. 287. Fit. pl. 289. Perk. 834. fo. 165. 6. Co. 78. b. 79. 14. Jac. Cro. 417. 1. Ro. Rep. 309. [3. Com. Dig. 266. 3. Bac. Ab. 208.]

(5) **T**HERE are two joint-tenants for term of their two lives, and one of them made a lease by indenture for years of his part and moiety, reserving to himself and his heirs a rent: the lessor died: Whether the term is gone by his death, † and the survivor shall hold the entire freehold discharged of the term; or, supposing the term to continue, Whether the survivor shall have the rent, was moved by WELSH. And as it seemed to the Court the term continues, and he shall hold it discharged of the rent. *Quare bene.*

(5) *Trin. 37. Eliz. Harding and Charde [Moor, 395.].* Joint-tenant for life makes a lease for years to commence after his death, and dies: adjudged a good lease before all the Judges of Serjeants' Inn by the opinion of seven Judges against four. It is entered E. 37. El. Rot. 244.

E. 33. Eliz. Rot. 211. B. R. [Cro. Eliz. 287.] between *Grut and Crust*, in a case of baron and feme joint-tenants for life, and the husband leases for years.

H. 37. El. Rot. 363. B. R. *Farnham v. Barton*, [Moor, 395. Noy, 157. *Harbin v. Laby, J. C.*] where the survivor held under a lease to commence after his death.

† Orig. ou,

If justices in quarter sessions under 8. H. 6. c. 9. grant a writ of restitution, whether any other justice not present can grant a *superfedeas*, *quere*. If at a special sessions, none can, except the justices of B. R.

Jenk. Cent. 5, c. 74. S. C.

Dyer, 122. b. Lambert's Eirenarchæ, 157. 9. Co. 118. 7. Bro. 65. 24, 15. H. 7. 28. 5. 1. H. 8. Cro. 159. 21. Aff. 1. B. Judgment, 7. Dall. Rep. 32. Dalt. 185. Dy. 123. a. 11. Co. 59. Benl. in Keilw. 204. a.

[1. Hawk. P. C. 289. 292. 2. Hawk. P. C. 417, 418.]

(6) **A** QUESTION was asked of the Judges of both Benches by the Keeper of the Great Seal: If complaint be made at the *quarter sessions* to three justices of the peace there sitting of a forcible entry and forcible detainer of any freehold by him who is disseised, and a bill or presentment of it is found "against the form of the stat. 8. H. 6. c. 9." and the said justices upon that grant a writ of restitution; Whether any other justice of peace who was absent from the sessions may lawfully grant a *superfedeas* in this case or not. And as it seems, if the sessions was a special sessions for that purpose, and the justices to whom this complaint had been made had repaired to the force to have a view of it according to the intent of the statute, and afterwards had enquired of it and found it, and upon this had granted a restitution, no other justice could grant a *superfedeas*, for no other justice has authority by the statute to

(6) If justices of peace award restitution, and before restitution made a *certiorari* come from the Judges of B. R. to remove the indictment, which is delivered to a justice of peace who was *not* at the sessions, he may award a *superfedeas*, as was adjudged in *Fitzwilliam's Case*, *Hil. 45. Eliz.* [but by *Cro. Eliz. 915.* and *Telv. 32.* where it is reported, the justice to whom the *superfedeas* was delivered appears to have been one at the sessions, but now by 21. *Jac. 1. c. 8. § 7* the *certiorari* must be delivered at some quarter sessions in open court,]

grant

grant restitution except * he or they before whom the complaint and force have been found; and the writ shall be made under the *teste* of one of them only, except the Judges of B. R. who have supreme authority, the king himself sitting there, as the law intends, *accord* to 7. E. 4. [18. pl. 12.] See † 21. H. 7. 21. a.

(6) **A** MAN possessed of divers dead chattels made two executors and died, and one of them got the goods and disposed of divers sums of his own money at his discretion in pious uses and works of charity, as in the payment of the taxes of a poor vill, and in repairs of the church and religious houses, and in alms for the salvation of the testator's soul; which sums amounted to more or as much as the chattels were worth, to the intent that he might have and retain the said goods of the testator as his own goods, and to be converted to his own proper use; and died possessed of the said goods, and made executors: and after his death the goods came to the hands of his executors, against whom the executor who survived brought an action of detinue for the aforesaid goods, *s.* chattels to the value of one hundred pounds. And defendants pleaded these payments and disposition of their testator, and the conversion of the property as above, whereby he was possessed of the chattels aforesaid as of his own proper goods, and justified the detainer as the proper goods of their testator for the execution of his will, &c. And this was received as a good plea; and issue taken that the chattels were of greater value than the sums above &c. *Nota bene.*

An executor disposing of his own money in pious uses *pro salute animae testatoris*, may retain goods of the testator to the value.

Plow. 185, 186. Ante, 2. Swaburne, 203. 4. 16. H. 7. 4. 4.

Bro. tit. Affets, n. 68. tit. Exec'. 116. 150. tit. Administ. n. 37, 38. 51. 20. H. 7. 5. a. 21. E. 4. 21. b. 6. H. 8. 2. a.

28. H. 8. 23. b. 17. E. 3. 66. Dett. 89. 32. E. 3. Quid Juris clamatur, 5.

[Vide ante, 2. a. pl. 3. Swab. on Wills, 460, 461. 2. Bl. Com. 507, 508. 511.]

(7) **I**N DOWER against eight, and two confessed the action, but the others pleaded in bar, judgment was given that the plaintiff should recover seisin of the third part of two parts of the manor and tenements aforesaid with the appurtenances in eight parts to be divided &c.; and afterwards, upon the verdict against the six remaining, the judgment was, that the plaintiff should recover her seisin against them of the third part of six parts of the manor and tenements aforesaid, &c. in eight parts to be divided &c. And so note this division well; and it agrees with 10. Lib. Aff. 2. [pl. 12.] and M. 17. E. 3. [46. pl.] 4. and T. † 10. H. 5. Rot. 447.

Dower against eight, two confess, the rest plead, judgment immediately for the third part of two eighths of the land, and on the issue found for the demandant, judgment for one third of the remaining six parts.

6. 17. Aff. 4. 4. 2. 10. E. 3. 29. B. Demand. 49. Co. Lit. fol. 34. 3. Keb. 31.

In assize, outlawry pleaded in disability, issue on *nul tiel record*, the record being shewn varied in the day and place; and plaintiff also producing a record of reversal, though obtained after issue joined, had judgment, and defendant was holden a disseisor, without a recognition of assize, according to *W. 2. c. 25.*

* [188. a.]

[*Ld. Raym.* 274. 1014. 5. *Com. Dig.* 394, 395. *Cowp.* 476. 1. *Hen Bl.* 49. 162. 4. *Term Rep.* 590.]

Cro. 96. 21. *H.* 7. 9. *Plow.* 411. 3. *H.* 6. 14. 6. *Co.* 53. b. 1. *Inf.* 260. a.

[*Br. Monstrans.* 50. 3. *Salk.* 296. 2. *Hawk* 420. 2. *Com. Dig.* 22.]

Dy. 187. 153. b. 20. 39. *H.* 6. 39. b. 4. a. 208. 3. *Annuity*, 33. *Dy.* 234. 228. a. 18. *Aff.* 45. 38. *H.* 6. 45. 7. *H.* 4. 1. a. 7. *H.* 6. 3. 2. 6. 3. 9. *H.* 6. 26. 4. b. 5. *H.* 5. 1. b.

(8) NOTE, IN ASSIZE the tenant pleaded outlawry in the plaintiff, and shewed all the process in certain: and that the *exigent* was returnable on the octave of *Saint Hilary* in the 14th year of *H. 4.* and that the outlawry was proclaimed on such a day at *A.* in the county aforesaid, without making *profert* of the record of it: judgment whether he shall be answered or not. And plaintiff says *nul tiel record*, and the other *à contra*, and day was given to the defendant to have the record &c, at which day the tenor of it was brought, by which it appeared that there was a variance in the day of the return of the *exigent*, and in the place where the outlawry was pronounced: and also the plaintiff produced the tenor of the reversal and annulling of the said outlawry which the record purports in *B. R.* and both tenors were sent by writs of *mittimus*, which reversal appears to be since the plea above pleaded. And yet for the variance aforesaid, and also the other matter, this was adjudged a failure of record; and the defendant was holden a disseisor, without a recognition of the assize, according to the form of the statute [*West.* 2. c. 25.] &c. And note, this record of the assize was brought into the Bench by the Justices of Assize with their own hands on account of the difficulty.

(8) Note, Where outlawry is pleaded in disability of the person, it ought to be shewn immediately; but when in bar (if it be denied), he shall have a day to shew the record. *Inf.* 128. a. b.

A common recovery suffered by a sheriff of lands in his own county is erroneous.

The issue may have a writ of error to reverse a recovery suffered by tenant in tail, although he brought a writ of error himself, and released all errors to bar the estate. And so may be in remainder if the

Sir Ralph Rowlet's Case.

(8) SIR RALFE ROWLET, knight, seized in tail of the manor of *Gorbambury* in the county of *Hertford*, remainder over to a stranger in tail (the fee-simple in *Sir R. Rowlet*), suffered a recovery of it against himself in *Hil.* or *East.* Term last, in a writ of entry *sur disseisin* in the *post*, he then being sheriff of the counties of *Hertford* and *Essex*, with the common voucher over, which recovery was to the

(8) & *Cundib's Case*, 37. *El.* Resolved, that where a sheriff has a statute extended and a *liberate* directed to him, it is void. [*Mo.* 547.]

M. 21. 22. *El.* it was argued, and in the 25th year adjudged between *Braybrooke and Lord Maurice*, [*Mo.* 95. 3. *Co.* 1. 1. *Leon.* 270.] that he in remainder might have a writ of error; but if he in remainder be attainted during the life of the tenant for life, the queen shall not have it. *Henningbam v. Wyndbam*, *J.* 17. *El.* [*Ow.* 68. 1. *Leon.* 261.] so adjudged as was there said. [*Cruise on Recoveries*, 289, 290.]

use of *Sir Nicholas Bacon*, Keeper of the Great Seal, and his heirs; and to avoid the error of this recovery had against him being sheriff of the county, it was devised, that *Sir R. Rowlet* should release all errors and writs of error; and that afterwards a writ of error should be brought by him, and that by the said release confessed, or tried by verdict against him, that he should be barred of the writ of error. It was moved, Whether his issue, or he in remainder in tail, shall be barred from bringing a writ of error, or formedon, by this judgment in the writ of error. And divers of the Judges thought that they should not, for such releases do not bar the right of the intail, &c. But *quære*, whether he in remainder in tail shall have a writ of error, if the issue of the first intail fail, by the stat. *R. 2.* [*An. 9. c. 3.*] or by the common law, because he is not privy in blood to the tenant in tail who lost erroneously the land. And it seems by the opinion in *Easter 4. H. 8. fol 1.* [*ante, pl. 5.*] that he may.

issue fail, although not privy in blood.

[*Dalt. Shf. 153.*]

Finch. 6. a. 1. Co. 67. Dy. 220. 45. Aff. 13. 18. H. 8. 3. a. 8. 21. H. 6. 29. 16. Dy. 266. Plow. 2. b. Fitz. 108. 14. Aff. 3. 32. H. 8. B. Patents, 97. 6. Co. 7. b. Dy. 139. Co. Lit. 20. a. H. 8. Bro. Formedon, 18. 48. E. 3. 9. b. 14. H. 8. Tayle, 33. 19. E. 6. 37.

[*1. Burr. 410.*]

Vet. Nat. Brev. 144. a. 3. Co. 3. 4. 21. H. 6. 29. b. 4. 15. 17. Aff. 79. 8. 24. 4. E. 3. Attaint, 47. 20. E. 3. Error, 2. 15. E. 3. Error, 7. 18. E. 3. 25. 32. E. 3. Sci. Fa. 101. 3. Co. 3. b. 3. Crm. 388.

(9) **NOTE**, A fine for the master and fellows of the college in *Oxford* of the foundation of *J. White*, knight, citizen and alderman of *London*, of certain land to be amortized to the said college, was refused to be ingrossed for default of a writ thereof directed to the Justices of the Bench to pass such a fine, as was in the 19th year of *H. 8.* for a fine of this sort for the college of *Cardinal Wolsey* in *Oxford* to be levied * in the Bench aforesaid. Also for Queen's college in *Cambridge* a similar fine was rejected this Term for the cause aforesaid.

The Justices of *C. B.* refused to ingross a fine of lands to be holden in mortmain without a special writ for that purpose.

Plow. 502. N. B. 224. H. Bro. Fines levry, 10.

[*See 1. Bac. Ab. 363. and Cruise, Fines, 34.*]

* [188. b.]

Davis's Case.

(10) **MEMORANDUM**, That it appears of record in *B. R. Trin. 1. E. 4. Ro. 3.* that one *John Davis* struck one in the face with his right fist in the great hall

Striking in *Westminster Hall sedentibus Curia* punished with the loss of right hand, perpetual imprisonment, and for-

(10) *Trin. 3. Jac.* [cited *12. Co. 71.*] *Ballingbams*, for spurning *Dyer* in *Westminster Hall sedente Curia*. So [*Poph. 207.*] *Savel* and *Lord Worsley* for striking each other in the time of *CHARLES*, and *Windbam* by *Barber* in *Westminster Hall*, all obliged to procure their pardons.

9. *Eliz. Girling's case* [*3. Inst. 141. 12. Co. 71.*], and 17. *Eliz. Dawson's case*, the indictment *infra palatium et juxta magnam aulam*.

17. *El.* [cited *Cro. Car. 374.*] *Thomas Jones* struck one in the palace *sedentibus Curia*, and

Figure of lands and goods. 33. H. 8. B. 222. 3. H. 4. B. Paine, 16. Stamf. 28. 22. E. 3. 13. 19. E. 3. Judgment, 174. Ow. 120. Davis Rep. 35. Stamf. Prerog. 38. Postnati. 50. B. Contempt, 9. 2. Inst. 549. 39. Aff. 1. 41. Aff. 25 49. Aff. 18. Selden upon Hingham, 10. 133. 4. E. 3. Corone, 208. [1. Hawk. P. C. 88. 2. Hawk. P. C. 632. 4. Bl. Com. 125. 3. Term Rep. 737, 738.]

and killed him, upon which he had judgment to have his hand cut off, and judgment of death.

Trin. 19. E. 3. B. R. Rot. 21. & Rich. Carlion and others followed the jurors to the gate of the palace of our lord the king at *Westminster*, and there made an assault upon them, and beat them, and judgment was given against *Richard* that he should lose his right hand, and that it should be cut off, and himself committed to the Tower of *London* as long as he lived.

Eaft. 27. El. [Cro. El. 405. Owen, 120.] Carnes drew his sword upon the stairs of the court of requests, which is out of sight of any of the courts, and there if his indictment had been well drawn, he ought to have had the punishment as here.

RICHARDSON, Chief Justice of C. B. at the assizes at *Salisbury* in the summer of 1631 was assaulted by a prisoner condemned there for felony, who after his condemnation threw a brickbat at the said Judge, which narrowly missed; and for this an indictment was immediately drawn by *NOY* against the prisoner, and his right hand cut off and fixed to the gibbet, upon which he was himself immediately hanged in the presence of the Court.

Trin. 10. Car. B. R. [W. Jones, 343. Cro. Car. 373.] Sir William Waller was indicted for striking *Sir Thomas Reynold* within the palace, and near the great hall, *sedente Curia*, and it did not say that it was in the presence of the king: and for this he was fined one thousand pounds, and imprisoned at the pleasure of the king, and bound to good behaviour,

Aphary against Smith.

Array made by a former sheriff being quashed for coſinage, plaintiff may have a *ve. fa. de novo* to the new sheriff, or to the coroners, at his election.

Trial in *formedon* between the vouchee and demandant is within the statutes of *jeofails*, tho' they are not both parties to the writ.

Paſch. 1. 3. Eliz. Rot. 1164. 9. 10. 18. E. 4. 46. 3. 3. 10. H. 4. 149. 14. 15. H. 7. 31. 9. 6. Co. Lit. 158. a. 32. H. 8. c. 2. Raſt. Limitation, 3. 5. Co. 36. Dy. 184. 367. 297. 2. Raſt. Repleader, 2. [See Hob. 281. and 1. Danv. Ab. in *actis* 352.]

(11) **A**N array made by the predecessor of the present sheriff was challenged for coſinage, and quashed; the plaintiff may pray at his election to have a *venire facias de novo* to the present sheriff, or to the coroners, by the opinion of the Court. And this was prayed to the now sheriff in *formedon* by *Aphary against Smith*, who vouched to warranty another who came by process, and entered into the warranty, and traversed the seisin of one of the ancestors of the demandant in whom seisin was alleged within fifty years before the day of the writ. And it was found for the demandant, and he had judgment, notwithstanding it was said that the *ve. fa. de novo* above was not well awarded; and also that the trial was not between the parties to the writ, and so out of the statutes of *jeofails*; but the opinion of the Court on this was to the contrary.

(12) **T**O a *pluries replegiare* returnable into the Bench the sheriff returned that the cattle were elaigned by the defendant, and that no other writ &c. And upon this the plaintiff had a *withernam* to take of the goods and chattels of the defendant to the value &c. And this clause, *s.* and if the plaintiff shall make you secure as well of prosecuting his claim as of the returning of the cattle, if &c. then put the defendant &c. to answer as well to our lady the queen of the contempt as the aforesaid plaintiff of the damages and wrongs &c. [was omitted.] And now the sheriff returned the writ of *withernam*, namely, that the plaintiff had found pledges to prosecute and to make return if &c. And because he could not replevy the chattels first taken to the aforesaid plaintiff according to the exigency of the writ, therefore he took six oxen, &c. of the proper goods and chattels of the defendant, to the value &c. and delivered them to the aforesaid plaintiff in *withernam* to detain for himself until &c. ; * and further he returned, that the defendant had nothing by which he might be attached, &c. And now the plaintiff came not, but the defendant appeared *gratis*, and prayed that the plaintiff might be called ; and that if he would not prosecute upon the replevin, the defendant might have a special writ to the sheriff to make deliverance to him back of the said oxen, which were taken and delivered to the plaintiff in *withernam* ; for he says that the truth was, that the property of the chattels for which the replevin was sued, was in him, and not in the plaintiff. (13) And it was much debated in the court, whether the plaintiff can be nonsuited now, as if it was upon the (a) replevin ; and that a return of the first chattels shall be adjudged to the defendant, as LENNARD *Prothonotary* held, although the defendant have them in his hands already, with intent to drive plaintiff to the second deliverance if he will ; and it may be (notwithstanding the first return) that now the sheriff has made replevin, &c. And this precedent appeared *East. 30. H. 6. Ro. 438. [30. H. 6. 3. pl. 1.]* Replevin was sued by writ for one horse, and because the sheriff did nothing, the plaintiff upon suggestion in the chancery had an *alias replegiare* with the clause *vel causam* [Gillb. Repl. 72. 3.]

To a *pluries replegiare* in C. B. the return was an *elaignata*, and no other writ. On *withernam* sued out, it plaintiff do not appear (since no plaint was before the sheriff), whether he can be nonsuited. And on such default whether the defendant by suggestion of property shall have a special writ for the cattle taken in *withernam*, or a return of the first cattle. [Gillb. Replev. 82, 83.]

2. H. 4. 9. b.
Bro. Withernam, 9.

[* 189. a.]

[See 17. Cur. 2. 7.]

[F. N. B. 255, 256. in notis.]

43. E. 3. 26.
44. Aff. 15.

[Gillb. Replev. 78, 79. 106, 107.]

22. H. 7. Cro. 92.
5. E. 3. 56.

[Gillb. Repl. 72. 3.]

(a) But in replevin there can be no judgment as in case of a non-suit, for both parties are actors. 1. Bl. Rep. 375. 3. Term Rep. 661.

nobis significes, which was returned into chancery (but *quare* how), and with the excuse of the sheriff. And upon this the plaintiff had a *withernam* of the beasts of defendant, which was served. And afterwards the matter was removed out of the county by a *pone* into the Bench, at the suit of the defendant; and at the day in bank the defendant offered himself on the *quarto die*, &c. and the plaintiff did not prosecute, and the defendant went without day; and he made suggestion to the Court that the plaintiff had ten oxen of him in *withernam* for the aforefaid horse delivered by the sheriff; and also that the horse was put in pound overt by him, and there died of hunger by the default of the plaintiff. (14) And upon this he had a special writ to the sheriff to deliver the *withernam* returnable into the Bench. See 44. *Lib. Assis.* fol. 4. a good case for this matter. And yet at the end of the Term the writ of *withernam* above was amended, and made perfect, and these words, namely, “to answer to the aforefaid plaintiff of the taking and unjustly detaining of the chattels aforefaid,” put in the writ, according to the ancient form: and the writ was well returned served, viz. *pledges as well of prosecuting as of returning the chattels if* &c. and attachment upon the defendant.

And both appeared by attorney; and the plaintiff counted for the taking and detention of the aforefaid chattels, and declared “that he still detains,” and the value of them: and the defendant claimed property upon which they are at issue; the defendant did not give deliverance, but the plaintiff was driven to make it of *withernam*. Which note well, that the parties have day upon the replevin by such manner of process, and return above *, without any *pone*, or other writ, because no plaint appears to be commenced before the sheriff; for no writ of replevin which has the words “and afterwards there- upon cause him justly to be removed, that we may bear no more &c.” came to the hands of the sheriff, as appears by the return above. See a good form of *withernam* in the case above, fol. . † post. extracted from the book of

MR. JENOUR.

5. H. 7. 9.

[Post. 280. b.]

N. B. 74. c.
Br. *Withernam*, 12.

Where defendant claims property he does not give deliverance, but the plaintiff must of a *withernam*.

[Kitch. 145. F. N. B. 170. in notis. Gilb. Replevins, 90. 93.]

* [189. b.]

31. E. 3. Gager Deliverance, 26. 13. 15.
H. 7. 28. 28. 7. H. 4.
28. 1. 3. 4. 5. 30. E. 3.
9. Gager de ley, 6.
11. H. 4. 11. 2. 16.
H. 7. 5. b. 16. 21. 22.
H. 6. 40. 21. 43. E. 3.
26. 44. Ass. 14. Dy-
er, 246.

[Salk. 581, 582. See
Dy. 41. a. b. 59. b.]

Butler Demandant *against* Lady Bray, Tenant in a
Writ of *Quibus*.

B2D7.

(15) *EDMUND* late *Lord Bray*, seised of divers lands in the counties of *Bedford* and *Buckingham*, the lands in *Buckingham* being holden *in capite* by knight-service, in the 30th year of *Hen. 8.* by indenture made between him of the one part, and *Lord Audeley* then chancellor of *England*, *Lord Cromwell* lord privy seal, *Sir William Pawlet*, knight, then treasurer of the king's household, and now marquiss of *Winchester* and lord treasurer of *England*, and *Sir John Russell*, knight, then comptroller of the household, in the behalf and for the king of the other part, for the sum of eight hundred pounds bargained and sold the custody, rule, order, government, and marriage of *John B.* his son and heir apparent, and late *Lord Bray*, to the said four counsellors of the king, to the intent to be married at the appointment and nomination of them or their assigns without disparagement; and covenanted for the delivery of him to them before a certain day un-assied, &c. being then of the age of sixteen years. And in further consideration &c. he covenanted to assure his said lands in *Bedfordshire* before a certain day "to have to them and their assigns for and towards the finding of the said son, and such wife as he should marry by the appointment, nomination, and pleasure of the said four counsellors, ut supra, until he came to the age of twenty-one years; and then the lands to remain to the said son and such his wife, and to the heirs males of the body of the son &c." and a fine was levied to them in fee-simple to the uses and intents aforesaid. Afterwards the said *Lord Cromwell* died, the said marriage not having been made, nor any step towards it taken: after this died the said *E. Lord Bray*, the said *Jo.* his son being still within age, i. seventeen &c. which age, with the tenure aforesaid, was found by office in the county of *Buckingham*, by which the king was entitled to the wardship of him; who bargained and sold his marriage to the late *Earl of Shrewsbury* for one thousand pounds. And afterwards the said marriage was had and solemnized at the nomination, appointment, and pleasure of three of the said counsellors then living, and by the assent and * consent of the king with the said *Lady Bray*, being the daughter of the said

A father declares the uses of land to his son and such wife as he should marry at the nomination and appointment of four. One of them dies before the marriage, the authority of the other three is determined.

A father cannot grant the marriage of his son, which is a prerogative inseparably annexed to his person; and if he give authority to others to appoint the marriage, by his death the authority is determined.

1. And. 5. S. C.

[Bendl. 82. S. C.]

Turner's Rep. 67. 69. this case well argued.

Dy. 217. 2. 2. Ro. Rep. 101. Bro. Gard. 70. 8. H. 8. Cro. 186.

Vaugh. 180.

1. Co. 134. b.

[See the case of *Scot* and *Tyler*, 2. Br. Cal. Ch. 431.]

* [190. a.]

said late Earl. And after the full age of *Jo. Lord Bray* he bargained and sold the said lands in the county of *Bedford* now in dispute to *Butler*, and assured them to him by a fine with warranty and recovery. And afterwards he died, and the said lady survived and entered upon *Butler*; claiming her freehold and jointure as above, against whom *Butler* brought the writ; and she pleaded that she did not disseize, namely, the general issue. And this matter was given in evidence; and a demurrer in law to it, and the jury was discharged.

(16) Also it was a clause in the indenture, "*That if the marriage shall take none effect by reason of the death of the said L. Edm. Bray, or refusal of the said Jo. Bray or otherwise, that then the said eight hundred pounds should be repaid, &c. and that thereafter the said indenture and all assurances to be made according to the covenants thereof should be clearly void.*" But it was alleged in evidence on the part of *Lady Bray* that the money was not repaid, which is not denied, &c. The first point is, What interest passed from the bargainor to the bargainees by the said bargain and sale of the custody and marriage as above; and whether the words "to the intent to be married at the nomination, appointment, and pleasure of the bargainees without disparagement" are vain and void words, or material to repose a special confidence in them. Also, Whether the three survivors (*Cromwell* being dead) can execute the bargain aforesaid or not. Also, Whether by the death of the said *Edm. Bray* the father the bargain was utterly ceased and determined, the king being entitled to the ward; so that although the marriage was had by the nomination, appointment, and pleasure of the said vendees, and by the consent and assent of the king and *Earl of Shrewsbury* the assignee of the king, yet whether this conveys any use to the said *Lady Bray* or not, which is the chief point of the case, &c. (17) And note the words for the assurance in the indenture, namely, "*to make a good, sure, and sufficient estate to them their executors and assigns of and in &c. to have and hold to them and the survivor of them and their assigns until the said John Bray should accomplish and come to the full age of twenty-one years, for and towards the finding of the same John Bray and such wife as he should marry by the appointment, nomination, and pleasure of the said four persons or their assigns as is aforesaid, the remainder thereof from thenceforth after that he*

came

8. E. 4. 7. 16. E. 3.
64. Gard. 159. 33.
E. 3. Gard. 161. B.
N. 43. p.

Co. Lit. 181.

8. H. 5. Cro. 186.
[Ante, 177. d. pl. 32.]

1. Aff. 11.
By. 340. b.

"came [to] or should accomplish the said age of twenty-one 3. Co. 22.

"years (if he should live so long), to the said J. Bray and such

"his wife as he should marry as is aforesaid, and to the heirs

"males of the body of* the same J. B. lawfully begotten, &c."

* [190. b.]

(18) In which words no use or intent is comprized expressly, but that an estate in possession should be made to the said four counsellors only during a term of so many years as J. B. should be under age, which were not above five years, and then the remainder of the freehold should vest in J. B. and such wife *ut supra*, and to the heirs male of the said J. B.; and then when the fine was levied to the four counsellors, and to the heirs of one of them, and an averment taken that the fine was levied to the uses and intents recited and specified in the indenture, they were seised after the term above to the use of the conusor and his heirs, and not to the use of the said J. B. and his wife, and the heirs of J. B. and no estate in possession can be vested and executed in the same wife, who was not then named or known; and a freehold cannot be in abeyance until the marriage of the wife, for this is impertinent, therefore all vests either in Lord E. Bray the conusor in fee, by reason that no use is expressed, or in his only son, because he had then ability and capability of taking the freehold, but not his wife, who was married afterwards, any more than if I give land to one for a term of years, remainder to I. S. and A. his eldest son, and to the heirs of I. S. the father, and at that time I. S. has no son, but afterwards within the term he has a son born, he shall take nothing, because he was not *in rerum natura* at the time of the limitation of the remainder, and the freehold vests entirely in I. S. and no moiety in joint-tenancy with his son at that time, wherefore &c. (19) But *quite* of this word (*intents*),

Dy. 55. a. 169. a

[See] Dy. 71. a. 287.
[and Plow. 563. 1. Co.
134. b. 1. Com. Dig.
82.]

17. E. 3. 87. 7. H. 7.
13 18. E. 3. 5. 9.
Co. 130. a. 6. 17. b.
1. Co. 100, 101. 134.
10. E. 3. 27. 4. b. Ma.
142. a. 30. Aff. 47.
34. E. 3. 26. F. For-
medon, 18.

24. E. 3. 29. Joinder,
10. Perk. 55. 204. Dy.
274. b. Vaugh. 120.
6. Co. 22. Plow. 294.
Kelway, 186. 33. H. 6.
55. b. Bro. Gard. 6.
7 Co. 13. b.

8. E. 2. Trespass, 235.
F. N. B. 143. a. 32.
E. 3. Gard. 31, 32.
9. E. 4. 53. 29. Aff.

† *Tisor's case*, 25. *Eliz.* He had a son by one *venter*, and a daughter by another *venter*, the second wife died, the land holden by knight service *in capite* descended to the daughter within age of the ancestor *ex parte matris*; adjudged that the body of the daughter as well as the land shall be in ward to the queen, living the father, for she is not heir apparent to the father, but the son is.

† *Littleburie's case*, 34. *Eliz.* He had a daughter by one *venter*, upon whom descended land from her grandfather on the mother's side holden by knight-service *in capite*; now the queen shall have the ward of the land only. Afterwards the father took another wife, and had issue a son, and the daughter was still within age: now the queen shall have the ward and marriage of the daughter, for now she is not heir apparent to the father.

14. *Jac.* † *Lotber's case*. One being suitor to a daughter who was enriched by her grandfather, promised to the mother a sum of money to use her endeavours to persuade the daughter to marry; and upon *assumpsit* for this money the party pleaded *non assumpsit*, and objected that the mother had no interest in the daughter to make a good consideration: yet adjudged that she had such interest in her daughter as would make a good consideration. [Mo. 595. Sir Tho. Raym. 400.]

35. 3. Co. 38. F. Gard.
32. 16. E. 4. 2. Mo.
323. Noy. 38.

[Co. Lit. 84. Mo. 738.
But by 12. Car. 2. c. 24.
these fruits and conse-
quences of feudal te-
nure are all done away.]

Temps. E. 1. Tres-
pafs, 241. 1. E. 4. 1.
7. H. 3. Trespafs. 244.
12. H. 6. 14. 13. E. 3.
Utlawry, 49. B. Gard.
70. 26. 33. E. 3. Gard.
159. 161. Plow. 293.
18. 43. E. 3. 32. 23.
30. E. 3. 16. Barr.
257. Gard. 31. 32. 1.
Leon. 74. 234.

[18. E. 3. 18, 19. F.
N. B. 329.]

* [191. a.]

[See Bac. Ab. Autho-
rity (C.) (E.). Van.
Ab. Authority (B.).]

Dy. 177. 220. 219. 269.
10. 9. H. 7. 26. a. Mo.
26. Palm. 23. 27.

S. H. 8. Cro. 186.
Lit. 108.

because by ANTH. BROWNE it is equivalent to *uses, &c.* And WESTON, *Justice*, argued that the father has no interest in his eldest son to be granted or sold to a stranger, because that is annexed specially to the person of the father as an inseparable prerogative. And CATLYN, *Chief Justice*, and SAUNDERS, *Chief Baron*, afterwards assented to this opinion; but ANTH. BROWNE and myself to the contrary. And this is proved by the trespass *pro Katharinâ, filiâ et hærede suâ raptâ, abductâ, et maritatâ*, against the will of her father in ϕ 9. E. 2. And see *M.* 30. E. 3. 10. [b.] ϕ H. 31. E. 3. 2. and ϕ *M.* 32. E. 3. for an orphan 1. and 7. for his cousin and heir whose marriage belongs to him. And ϕ 18. E. 3. and 21. H. 6. fol. 16. [14. b. pl. 29.] and H. 12. H. 4. [16. a. pl. 9. and 10.] this clause (*cujus maritagium*) is not necessary, and (*infra ætatem existent*) may be omitted, for it is not in the *Register* [See 98. b. 99. a.]. And note for the interest in the trespass *de uxore abductâ cum bonis viri*, and for a blood-hound 12. H. 8. [3. pl. 3.] &c. And see for the assignment or granting of custody in socage &c. 8. E. 4. [7. pl. 2.] And WESTON argued that no interest passed by the sale above, and then concluded that * no survivorship takes place, therefore by the death of *Cromwell* the authority to appoint &c. is gone: but BROWNE and I to the contrary, because they have an interest in the son and marriage which survives. And then these words *to the intent to be married at the appointment &c.* are void and null to this respect, but by those words (*without disparagement*) the intent is material and parcel of the contract; for without these words no marriage shall be adjudged disparagement, because no penalty ensues therefrom to the father as guardian in chivalry.

(20) And further as to the second point it seemed to WESTON and ME, that the death of the father dissolved and determined all the bargain and the authority of the four vendees, although afterwards the marriage took effect by their nomination, appointment, and pleasure, and by the assent also of king H. 8. for whom and on whose part the indenture was made above; yet this is no interest in the king, nor gives him any interference in the matter: and especially because the king at a later time had title of ward by the tenure and office; and when he granted it to the earl of S. for one thousand pounds, he granted his interest in the heir, and by the exemption of this in the court of wards the intent of the king cannot

cannot be understood other than that he destroyed and refused his first bargain in the marriage concluded by his counsellors. And although the marriage was made at the nomination, appointment, and pleasure of all the counsellors aforesaid, and also by the assent of the king, yet when the earl of S. joined with them, this is the sole act and preferment of the earl. And it is like this case: If I be the patron of a church which is void, and a stranger present by usurpation, and his clerk be in for six months, and then he resign, and when he has resigned I grant him an annuity until he be advanced to a benefice by me, or at my nomination, and afterwards I request the usurper to present him to the same nomination, and he and I join in presenting the same person, the annuity is not determined. The law is the same if one man have the nomination and another the presentation over of the same person, and he who has the presentation grant an annuity to a clerk as above, and he be admitted to the benefice above at my nomination, and also at the presentation of the grantor, yet the annuity is not determined because he is not in immediately by the grantor. The law is the same of a corody &c. (21) And so when divers men join together in doing an act, where some of them have nothing to do in the matter, the law will adjudge those only actors who have an interest and authority to do it. *Vide simile* in 14. H. 7. [2. b. pl. 9.] in debt where a surrender was pleaded. And also there is another * matter to prove against the lady, s. when the son was married the danger of paying the value of the marriage to the earl of S. his guardian in fact, if he was not married by him, and this forfeiture remains still against his executors. And on the other hand, for refusal of the marriage tendered by the vendees, there no damage or peril should ensue; therefore it is intendable that he elected and allowed the tender of the earl before the tender of the counsellors &c. And this is also proved by the sequel of the fact, viz. in this, that he aliened the land afterwards with warranty to Butler &c. And so upon the whole matter *Lady Bray* is not *talis seu hujusmodi mulier qualis* should be appointed and nominated at the pleasure of the vendees, and no name of baptism or surname has she, but by the circumlocution of *talis qualis* as above; wherefore &c. And so it was concluded by WESTON and ME, that the wife has no use or jointure, wherefore the plaintiff ought to recover seisin upon this evidence: but BROWNE

Finch. 26.

[14. Vin. 128. Powell on Powers, 377, 378.]

28. H. 8. 13. a. Mo. 894.
Dy. 48. a. Pl. 5. 20. a.
157. 33. E. 1. Annuity,
51. F. N. B. 33. 21. H.
7. 32. b. 2. Co. 57.
Perk. 15. a. 87. 22.
Feoffment 8.

Br. Surrender, 2.

* [191. b.]

9. Co. 11.
Br. Nollan, 36.

1. Aff. 12.
17. E. 3. 29.

Dier, 274. 340.

à contra, because it signifies not by whose effectual nomination of the persons aforesaid the said wife was married, so that the intent and words of the indenture are executed and fulfilled. And afterwards in the end of next Term, judgment of seisin was given for the plaintiff, namely *Butler* against the Lady.

Because it appeared that by the death of *Lord Cromwell* before the said marriage appointed, the others who survived him cannot appoint the marriage, for by the said indenture it was a joint commission to those four, and also if he assent during his life-time after the death of the said *Edward Lord Gray*, he cannot then appoint the marriage to the said *Jo. Gray* being under age, by the prerogative of the king in the wardship of his body, and then also the bargain of the said marriage was void. *Benloe's Case*, 128. fol. 83, 84.

Hawtreys Case.

A. seized of land to himself and his wife for life, and to the heirs of *A.* makes a feoffment to the use of himself and wife for life, remainder to a younger son for life, remainder to his own heirs. On his death his wife is remitted if she please, and is in of her first estate.

[4. Viner, 135. 18. Viner, 435.]

8. Co. 72. a. Hob. 71. Dy. 106. b. 43. a. 32. H. 8. c. 1. Rast. Willes, 1. 41. E. 3. 18. 44. E. 3. Departure, 16 46. E. 3. 24. Dy. 51. b. 54. a. 121. 129. a. 162. 351. 28. H. 8. 23. b. Plow. 112. b. Co. Lit. 126. 5. H. 7. 32. Plow. 114. b. Hob. 71. 1. Inst. 320 a. [quod vide & ante 246. Com. Dig. Remitter (C. 6.) Shep. Touch. 153. and note 1. there. 3. P. Wms. 461.]

(22) **K**ING *Henry 8.* by his letters patent dated *anno 37.* gave land to *I. S.* and *A.* his wife and to the heirs of the husband to hold *in capite*. *I. S.* enfeoffed *A. B.* and *C. D.* to the use of himself and *A.* his wife for the term of their lives, and after their decease to the use of a younger son for the term of his life, and after his decease to the use of himself and his heirs. *I. S.* died, his heir within age and in ward to the queen for other lands holden *in capite*, and *A.* his wife survived and held herself in, claiming her first estate: Whether the queen shall have the third part in ward or not? which depends wholly upon the *remitter*. And for this case the statute of Uses 27. *H. 8.* [c. 10.] and also the statute of 33. *H. 8.* [32. *H. 8.* c. 28.] for discontinuances made by the husband, ought to be considered and compared. And at length in the next Term before *WILLIAM CYCILL*, knight, secretary, master of the wards, the case was resolved *in camera* ward. that this was a *remitter*, and then the queen shall not have the third part, for the wife had election, *s.* to be in according to stat. 27. or by stat. 32. *H. 8.* [c. 28. §. 6.] inasmuch as her entry thereby was congeable.

Trin. 15. Jac. Rot. 988. Duncomb's Case, [Hob. 254.] Husband levied a fine of the land to his wife, and died; the wife accepted a lease for years of the same land. Resolved that it was a *remitter*. By *HARRISON*, reader of *Lincoln's Inn*, Lent 1632.

* Linsey against Dixon.

(23) A WOMAN, in *ejectione firmæ* brought against her, pleaded the custom within a manor that the widow of every copyholder in fee simple, fee tail, or for term of life, should have and enjoy the copyhold for the term of her life. And this custom was traversed, and in evidence at *nisi prius* in maintenance of the custom before pleaded, the woman claimed only a widow's estate: and upon this evidence it was demurred. And it was holden by the Court here in the bench that this evidence will not maintain the custom before alleged, because it is a smaller estate than the other custom, *s.* for term of life; and every custom shall be taken strictly; wherefore &c. And note in the indorsement of the *posse*, the evidence was set forth for the woman to prove the custom by one ROBERT BATES her counsel, That the custom was, that the wife of every customary tenant as above should have and enjoy his customary tenement after the death of her husband dying seised &c. during her widowhood *only*: and this word "*only*" fully expressed that it is strongest against the woman &c. And it was not politically alleged by the counsel. And afterwards in the end of the Term judgment was given against the woman.

The custom of a manor pleaded to be that the widow of every copyholder shall enjoy the estate *pro termino vite*, is not supported by evidence, which shews it to be only *durante viduitate*.

Co. 4. 30. a. 37. H. 6. 26. b. 3. Cro. 415. 1. Inst. 42. 1. Ro. Rep. 48. Perk. 84. 11. E. 3. Dower, 85. 5. 13. H. 7. 31. & 41. 13. 11. H. 4. 33. a. 21. E. 4. 24.

Plow. 7.

[Cowp. 62, 63. 3. Term Rep. 264. 4. Term Rep. 159.]

Rythe, one &c. against Kempe.

(24) RYTHE one of the attornies of the bench sued out at the commencement of this Term an attachment of privilege against one *Kempe* in a plea of trespass returnable at a day certain, not a common return day, now past: and after the said writ awarded, the defendant was condemned this Term in another writ of trespass of privilege as above, at the suit of the said *Rythe*, by a verdict given this Term; upon which judgment was given, and a writ of *capias ad satisfaciendum* was awarded to the same sheriff, *s.* the sheriff of *Middlesex*, returnable after the said first day: and at the day of the first return, upon the first writ he returned two *cepi corpus*, *s.* one by virtue of the first writ, *s.* *ad respondendum*, and the other *ad satisfaciendum*; and brought the body in accordingly, and brought into court both the said

A *ca. ad res.* and a *ca. fa.* being sued out in the same Term upon attachments of privilege between the same parties; on a *cepi corpus* returned to the *ca. ad res.* and the sheriff's declaring his intent when the *ca. fa.* was returnable to state the special matter, the Court committed the defendant to the Fleet, and discharged the sheriff of the body.

[Co. Ent. 436. 3. C.]

[192. a.]

Michaelmas Term, 2. and 3. Queen Elizabeth.

7. H. 6. 42. a. 38. E. 3.
21 b. 6. Co. 54. Dier,
197. a.

writs, one of them with the return aforesaid, and the other he said he intended to return when the day should come, specially making mention of the first matter of return : and this well and politickly as it seems to save himself harmless from escape &c. And upon the abovesaid return the said *Kempe* was personally in the court (which the Court well knew), the said *Rytbe* the plaintiff being absent, although he was an attorney of the court, and shall be intended to be there. And yet *LOANE*, clerk of the prothonotaries and attorney also of the place, prayed the Court for the plaintiff that the said *Kempe* should remain in execution upon the condemnation aforesaid, and shewed the record there ready. And whether the Court ought to grant this or not was in doubt. But at length by the opinion of *A. BROWNE* and * *JAMES DYER* he was committed to the *Fleet*, and the sheriff of *Middlesex* discharged of the body; *WESTON* being of a contrary opinion privately. But *quare* whether the *capias ad satisfaciendum* in the case above was well awarded, because no *capias* nor process of outlawry lies upon such suit of attachment of privilege. Also whether it lies upon a recognizance. *Vide* *H. 11. Eliz. fol. [M. 13. & 14. Eliz. 306. pl. 62.]*

* [192. b.]

19. H. 8. 1. Exigent, 1.
Br. Execut. 150. 49. E.
3. 2. b. 3. R. 2. Execution, 264. 48. E. 3. 14.
Dr. & Stu. 18.
21. 16. H. 7. 13. & 15. a.
6. 3. Co. 12. 18. H. 6.
18. b. Dier, 193. b. 287.

[1. Leon. 329. Cro. Eliz.
215. 3. Com. Dig. 301.]

Milna v. Browne.

LONDON.

On a *capias utlagatum* returned *non est inventus*, defendant appearing *gratis* cannot plead to the outlawry, for the plaintiff is out of court, nor is it known that he is the party outlawed unless brought in on a *capi corpus*.

[22. Vin. Ab. 367.]

27. H. 8. 1. 21. H. 7. 8.
1. E. 4. 2. 19. 3. H. 6.
43. 1. b. 21. E. 4. 69.
Dier; 172. 195. 206. a.
213. b. 214. a. 1. Inst.
228. b. 10. E. 4. 12. b.
16. a. 33. 37. H. 6. 1. b.
37. 10. H. 6. 48. 80.
21. H. 4. 7. 1. H. 4. 4. b.
21. H. 7. a. 21. E. 4. 78.
12. H. 7. Cro. 21.

(25) *MEM.* That a *capias utlagatum* was awarded to the sheriffs of *London* against one *Francis Browne* brother to the sheriff *Mountague* by the name of *F. B.* of *London*, gentleman, at the suit of *Stephen Milna* in *London* in a plea of debt outlawed &c. And at the day of the return the said *F. B.* came *gratis* in his proper person; and the sheriffs returned *non est inventus* &c. And he pleaded in discharge of the outlawry because he was commorant, and conversant at *G.* in the county of *Dorset* on the day of suing forth the original writ, and always afterwards pending the said writ, and not at *London* &c. And whether he should have the plea or not, was moved, because he is not hurt by the outlawry, and also he comes in *gratis*, and not in custody of the sheriffs: and *non constat* to the Court whether he is the same person who is outlawed. And here the plaintiff at

whose suit he was outlawed is out of court, wherefore it seems he shall not have the plea; and so it is holden by the better opinion in 3 *E. 4.* [15. a. pl. 10.] and 22. *E. 4.* [37 b. pl. 22.] and 21. *H. 6.* fol. 23. [21. b. pl. 43.] and 22 *H. 6.* fol. 8. [7. a. pl. 8.] And there is a precedent accordingly in *Libro Intration.* fol. 239. b. and in 15. *H. 6.* in *Stat-ham*, title *Error*. And at length PER CURIAM, The plea is not receivable if he do not come in in ward by return of *cepi corpus*.

10. 12. 15. *H. 6.* 46. 7. b. Error, 23.
7. *H. 7.* 8. b. 48. *E. 3.*
1. b. 22. *H. 6.* 20. b.
10. *H. 7.* 11. b. *Dier*,
286. pl. 41.

[Co. Lit. 259. b. a.
Hawk. P. C. 653, 654.
4. Burr. 2533, &c. See
Salk. 496.]

Parker and Another against Tenant and Others.

(26) **I**N debt by *Parker* and *Gybson* against *Tenant* and Others as administrators of one *I. Tenant*; and they declared upon an obligation made by the intestate: defendants denied the deed, upon which they were at issue. And at *nisi prius* in *London* this Term, in a special verdict it was found, s. That the said *I. T.* in his life-time caused the said obligation to be written, and sealed it; which writing was made to the use and behoof of a woman named *M. Hagstones*, whom the said *I. Tenant* intended to marry. And on the day of the solemnization of the marriage, and before the marriage, he delivered it to the said woman, saying these English words, s. "*This will serve.*" And immediately she delivered it over to the said obligee, *Gybson* then being present, without more words. Whether this shall be adjudged the deed of *I. Tenant* or not, the jury prayed the advice and discretion of the Court &c. and if &c. then damages &c. And in the end of the Term the plaintiffs had judgment to recover by the whole Court upon good debate. And error was sued in *B. R.* where the opinion was the same as above.

A. makes a bond to *B.* for the use of *C.* and putting it into *C.*'s hand in presence of *B.* says "*this will serve,*" it is a good deed.

[Ben. 92. pl. 140. S. C.]
[Jenk. C. 5. c. 75. S. C.]
2. Ro. Ab. 24. 1. Inst.
49. b. Ow. 44. Br.
Barre, 53. 2. E. 4. 2.
36. H. 8. Br. 288.

9. H. 6. 3. 7. b. 35.
Aff. 6. 41. Aff. 10. b.
9. Co. 137. a. 14. Dy.
186. pl. 1.

[Shep. Touch 55, 56.
Cowp. 204. Dougl. 539
54. note (17).]

A. makes a bond to *B.* and seals it, and throws it upon a table, and *B.* takes it, and brings debt; but he cannot recover because the delivery is wanting. *M. 28. Eliz. C. B.* and adjudged *E. 31. Eliz.* between *Chamberlaine* and *Stannion*, [Cro. Eliz. 122. Ow. 95. 1. Leon. 140. Harg. Co. Lit. 36. a. note (b).]

* Warneford's Case.

(27) **A**MAN seized of lands in fee of the annual value of one hundred marks holden of the queen in capite by knight-service, in the 6th year of *Edward 6.* made a feoff-

* [193. a.]

IN CURIA WARDORUM.
The king's tenant in capite to defraud the execution of 300l. on a judgment recovered a-

gainst him made a feoffment conditioned for redemption on the payment of 20*l*. On his death the heir within age shall not be in ward, unless covin to defeat the king of the wardship be found.

See 6. 10. Co. 76. 57.

Dier, 267. b. 361.

Ley. 16.

Stat. de Marl. c. 6. 4.

E.2. Gard. 119. 32.E.3.

Gard. 33. 31.E.3. Col-

lusion, 29.

4. 21. H. 7. 5. 18.

34. H. 8. cap. 5. Rast.

Wills. 3. 1. Inst. 78. a.

Dier, 273. 293. 10. Co.

47. 6. Co. 76.

9. 1. B. N. C. 394.

[Shep Touch. 66.]

[Wardship abolished by

32. Car. 2. c. 24.]

ment in fee of it to *A. B.* and *C. D.* to the use of them and their heirs, upon condition, that if the feoffor, his heirs or assigns, should pay or cause to be paid to the said feoffees, their heirs or assigns, twenty pounds, or should obtain an acquittance thereof from them, that then immediately the said feoffees, their heirs and assigns, should thereof enfeoff or make such estate and interest of it to such other persons, their heirs and assigns, in such manner and form, and to such uses, be-
hoofs, and profits, as the said feoffor or his heirs should name, appoint, ordain, and limit; otherwise the said feoffment, and writing, and possession, and seisin upon this delivered, to be for ever void and of no force in law. And afterwards the feoffor died, his heir within age. Whether the heir and the third part of the land should be in ward, *quare*. And this depends on the covin which should be found by office, or &c. But KEILWAY thought that without any inquiry of the covin, the third part shall be in ward; because the feoffment above shall be intended within the article, for the advancement or preferment of the children of the devisor &c. For he knew that the covin in this case was devised to defeat the execution of three hundred pounds damages in which the devisor was condemned in *B. R.* at the suit of *Lord Chandos*; lately deceased, and not to the intent to defraud the queen &c. of the ward; and so the covin above does not extend to the queen, and then it is impossible to make the jury find the covin for the queen; but *quare* well thereof. But by the opinion of divers others the matter cannot serve the title of the queen without finding the feoffment to have been made by covin. And about the 8th year of the present queen all the matter above was found by office, and that there was no fraud or covin to defraud the king, his heirs, or successors, of the custody of the body or land. [*Post*. 267. b. pl. 15.]

Defendant in replevin taking out a *venire cum proviso* may pray a *decem tales* as well as the plaintiff himself.

10. Co. 104. b. 15. 16.

H. 7. 9. b. 14. 5. H. 5.

(28) **T**HE avowant had a *venire facias* with a proviso served; and whether he can pray a *decem tales* as well as the plaintiff in an action may, was moved. And the prothonotaries doubted, but at length the request was granted by the Court, because the first panel was arrayed and made at the

the suit of the avowant; and therefore the *tales* may be well granted. See of process with a proviso, *post. fol.* [215. a. pl. 51.] and *M.* 14. [*Eliz. post.*] fol. [318. pl. 10.]

1. a. 21. H. 6. 22. b. Dier, 78. a. 217. a. 359. Br. Venire Facias 18. Br. Nisi Prius 40. [3. Bac. Ab. 246. and see the books cited in margin there, 2. Hawk. P. C. 574.]

Rythe, one &c. against Kempe.

* [193. b.]

(29) **N**OTE, That *Kempe*, who was in execution in the *Fleet* at the suit of *Rythe* in trespass this Term, brought a writ of attain returnable this Term; * and before the return thereof he brought a writ of mainprise out of chancery directed to the Justices of the Bench to admit him to mainprise, to prosecute his attain with effect, and to render his body to prison, if &c. And because no precedent was to be found of such a writ in the bench (although it was common in *B. R.*) and also such a writ directed to the Justices to hold pleas before the king is in the *Register* [123. a.] the Court was in doubt, whether the writ above should be allowable or not. But at length good and sufficient manucaptors being taken as well for our lady the queen as for the party, he was set at large by the Court. Yet afterwards, see the contrary *E.* 16. *E.* 3. 6. [*Fitz. Ab. Tit. Attaint*, pl. 24.] and that it shall be commanded to the warden of the *Fleet* to have the prisoner in court every day *pendente placito*. And afterwards in the next Term the parties agreed: and plaintiff in his attain wished to make a *retraxit*, and so he did; and the recognizance as to the party was discharged by acknowledgement of satisfaction; but for the recognizance as to the queen, *Curia advisare voluit*.

The writ of mainprise lies to *C. B.* for a prisoner in execution in the *Fleet* suing an attain as well as to *B. R.* and the recognizance is taken both to the king and the party, to render his body, if &c.

[The record of this case is in *Co. Ent.* 436. and see *post.* 364. b. pl. 31.] Dier, 192. b. 5. H. 7. 22. b. Dy. 81. b. 162. b. F. N. B. 106. d. [Ld. Hale's note (a).] 14. H. 7. 5. 8. Co. 58. Dier, 201. 11. H. 7. 4. Plow. 72. b. F. N. B. 104. n.

[Cro. Eliz. 5. This writ of attain is obsolete since the practice of setting aside verdicts upon motion, and granting new trials. 3. Bl. Com. 405. 1. Bur. 395.]

East. 35. *Eliz. B. R.* [*Coke's Ent.* 246.] Note, that it was holden in the case of *Onknell* and *Truffel*, that where the said *Truffel* was attainted, and this notwithstanding was put to answer to *Onknell* in an action of debt in *C. B.* on a judgment there, and upon that brought error in *B. R.* and prayed that he might be bailed where he was in upon execution for the said debt; all the Court held, that if the error be in any apparent error he shall be admitted to his bail, and the sureties shall be bound if the judgment shall be affirmed to answer the debt, and not to deliver the body into execution; and so by the clerks are all the precedents in the court. And *GAWDY* said, that in the 4th and 5th of this queen all the precedents were altered, for before it was doubted, but then the law was resolved as above; but where a man is in execution upon a statute merchant, and sues an *audita querela*, and upon that is bailed, his sureties shall be bound to render his body to be imprisoned, as before it was. And this was agreed *per totam Curiam*. [3. *Vin. Ab.* 415. *Stat.* 16. & 17. *Car.* 2. c. 8. §. 3. 1. *Com. Dig.* 373.]

Gascoigne against Whalley.

Pasch. Ult. Rot. 837.

The cruſor of a ſtatute enſeoffs the conuſee of part of his land, and his ſon and ſon's wife ſer jointure of the reſt; the conuſee having ſued execution on the ſtatute againſt the ſon, his wife need not join him in an *audita querela* brought on account of the ſeoffment.

In *audita querela* the plaintiff ſhall not have coſts or damages, though aſſiſted by the jury, but *tria* releaſe them.

[Benl. 80. A. Benl. 11. Mo 44. Dal 43. S. C.]

a. 1. Rot. Ab. 470.

3. Co. 12. b. 11. H. 7.

4. a. Plow. 72. b. 48.

E. 3. 5. b. 5. 13. H. 7.

25. b. 22. a. B. N. C.

263. 441. 71. 35. H. 6.

20. b. 45. B. 3. 22.

Dier. 297. a. 331. Mo.

335. a. Buiſtr. 14.

Dier. 339. b.

9. 48. E. 3. 24. b. 2. 12.

H. 6. 46. b. 24. E. 3. 30.

B. Audita Querela 41.

16. F. 3. Proceſs. 163.

17. 39. E. 3. 3. b. 30. b.

22. H. 6. 56. a. 6. H. 7.

16. B. N. C. 293. Dy.

894. a. 292. b. 339. b.

* [194. a.]

10. 17. E. 3. 29. b. 28. b.

37. H. 6. 18. b.

(30) *WILLIAM Gascoigne* knight was bound to *Richard Whalley* in a ſtatute merchant acknowledged before the mayor of *York* in the 38th year of *H. 8.* in one thouſand marks, at which time he was ſeiſed of divers manors in the county of *York*; and being ſo ſeiſed, afterwards enſeoffed of parcel thereof the ſaid conuſee, and of part of the reſidue he made a gift in tail to *William Gascoigne* (his eldeſt ſon as it ſeems), and to one *Beatrice* his wife in tail, and of the reſidue he conveyed eſtate to himſelf for life, remainder to the ſaid *W. G.* And afterwards *Whalley* ſued execution againſt the ſaid *William* the ſon, and procured an extent, and delivery of his lands aforeſaid in the bench in execution for the ſaid debt. And in *Hiary Term* laſt, ſ. upon the 9th day of *February*, the ſaid *William* the ſon in his own name, without ſpeaking of his wife, ſued in the chancery an *audita querela* directed to the Juſtices of the Bench comprehending the matter above; and in the concluſion of the writ it was commanded the Juſtices, that having heard the complaint aforeſaid of the plaintiff in this ſuit, and having called before them the parties aforeſaid, and having heard their reaſons on both ſides, they ſhould cauſe to be done due ſpeedy and complete juſtice to the ſaid plaintiff in the premiſes, as of right, and according to the law and cuſtom of the realm of *England*, ought to be done; *te. ed* 9th *February* as above. And thereupon the ſaid plaintiff came into the bench in his proper perſon on the 12th day of *February* above, and ſaid that the ſaid conuſor made the ſeoffment and grants above, and that by reaſon of the ſaid ſeoffment to the conuſee he ought not to have execution. (31) And upon this it was commanded to the ſheriffs of *London*, that they ſhould cauſe to come into the bench in fifteen days of *Eaſter* the aforeſaid *Whalley* to answer upon the premiſes, and further to do what the Court &c. and in the mean time to ſuperſede from all execution, by pretence of the recognizance aforeſaid, by any writ to the ſaid ſheriffs directed &c. without giving any day to the plaintiff. Note this, and *quære* to what intent the *ſuperſedeas* was comprised in the *venire facias*, for the body or goods of the plaintiff cannot be dammified, and no lands which were in the ſeiſin or poſſeſſion of the plaintiff did lie in *London*, but only in the county of *York*; and alſo *quære* for what reaſon

reason the writ of *venire facias* was awarded in *London* against *Whalley ex officia curie*, for no request was made by the plaintiff. And at xv. *Pasch.* the defendant (being warned) came; and without praying any *oyer* of the writ, or new declaration made by the plaintiff, pleaded immediately, "*That he, by reason of any thing in the aforesaid writ alleged, ought not to be hindered from his execution aforesaid of the tenements aforesaid, because not admitting any thing in the said writ contained to be true, for plea he says, that the said consur did not enfeof him the said defendant of the aforesaid tenements &c. prout &c. and of this he puts himself upon the country, and the said plaintiff does so likewise &c. Therefore let twelve &c.*" Note, this pleading above is not formal as it seems to me, but he ought to have alleged *that all the manors above descended to the plaintiff as son and heir, or by purchase, came to the plaintiff, without this that the said consur enfeofed the said defendant, prout &c.* And the plaintiff ought to reply to this &c. (32) And afterwards by *nisi prius* the issue was found against *Whalley*, and with the plaintiff, and damages and costs also assessed, although by the opinion of the Court no damages or costs are recoverable in this sort of action. And therefore it is considered that the said defendant should have no further execution against the aforesaid plaintiff of the tenements aforesaid, or any parcel thereof, but that the said defendant of all execution thereof by pretence of the recognizance aforesaid should wholly be hindered and precluded, and that the said tenements of the said execution should be wholly exonerated &c. no respect being had to the taxation of damages aforesaid. And note it was holden by the Court, that the not naming of the wife above is not prejudicial to the plaintiff. And afterwards in the next Term *Whalley* sued a writ of error.

Dier, 158. 297.
25. Aff. 7. 36. H. 8. b.
Stat. March. 42.

Br. Damages, 38. 129.

6. 10 Co. 25. b. 135.
47. E. 3. 1. 13. H. 7. 17.
11. E. 4. 8.

Reg. 264.

[Gilbert Exec. 142. a]
Crompt. Pract. 444.]

2. R. 3. 1. 3. H. 7. 2.
48. E. 3. 13.

[3. Vin. Ab. 346, 347.]

East. 38. *Elix. C. B.* Two consurs; their several lands are put in execution; they cannot join (if there be cause) in an *audita querela*: *aliter*, if they had been jointtenants of the land. *Worsley v. Charnock*. [Oro. *Elix.* 473. *Ow.* 106.]

Merrick's Case.

(33) *RICHARD Sampson* late bishop of *Coventry* and *Litchfield* was patron of two prebends within his cathedral church of *Litchfield*, called *Freaford* and *Cellwich*;

Super impedit must be brought in the county where the cathedral church is, though the

and

advowson itself be in another county.

In *qua. imp.* though the bishop who is patron die pending the writ, plaintiff may still have judgment, and the writ to remove the clerk in possession directed to the succeeding bishop or to the metropolitan.

43. E. 3. 33. b. 7. Co. 3.
21. E. 3. 3.

* [194. b.]

25. E. 3. R. 325. 40. E.
3. 7. Plow. 526. vel 529.
Br. Liew. 24.

and he granted the first and next advowson of either of them which should first happen to be vacant to another; and the dean and chapter confirmed the grant. And afterwards the prebend of *Freaford* became vacant first by the death of one *Blyth*. And the last bishop, *s. Ralph Bayne*, made a collation of it to one *Merricke* now prebendary there; and afterwards within the six months the grantee brought his *quare impedit* against the said *Ralph* and *Merricke*, and the writ was brought in the county of the city of *Litchfield*, within which it was supposed the cathedral church was. And this was on account of the opinion of the Court, *viz.* * that it ought to be brought in the county where the cathedral church is of which he is prebendary, and not in the county where the body of the prebend is, according to 21. E. 3. [5. a. pl. 13.] of the prebend of *Horton* in the county of *Gloucester*, which is a prebend in the cathedral church of *Salum*. And issue was joined in the case above upon a plea in abatement of the writ, because the cathedral church of *Litchfield* was within the county of *Stafford* and not within the county of the city of *Litchfield*; and it was found for the plaintiff, *s.* that it was within the county of the city of *L.*; and that it first began to be void two years past in *September* last; and the plenary of *Merricke* of the collation of the late bishop *Baine*, and that the *quare impedit* was brought within the six months, and the value of the prebend by the year at twenty pounds. And note, the bishop who was patron died pending the writ. And at length the plaintiff had judgment to recover the presentment, and damages at ten pounds only, and an *amoveas* of *Merricke*, and a writ to the present bishop or metropolitan at the request of the plaintiff to be directed.

Trin. 35. Eliz. B. R. Rot. 508. Sir Richard Pipe's Case, Quare impedit against patron, parson, and ordinary; the patron died; and yet judgment is given against all. But it was held to be error, *Cro. Eliz. 325.*

Pasch. 1. Reg. El.
Rot. 551.

Fortescue et Al' against Maynard et Al'.

A verdict being given on one issue for the plaintiff, on another for the defendant, the defendant may enter judgment on that found for him, though the plaintiff will not on his.

(34) **I**N trespass supposed in two things, the defendant to one pleaded not guilty, and for the other justified: upon which pleas they were at issue; and by *nisi prius* at the last affizes the issue of not guilty was found for the plaintiff, and damages assessed upon it; and the other issue was found

for

for the defendant. And now at this Term the defendant came and prayed judgment against the plaintiff, although the plaintiff did not pray judgment of his issue against the defendant. And by the opinion of the Court he shall well have it; and although the defendant for whom the verdict passed will not pray judgment, yet the plaintiff may pray it to attain the verdict. And so it was done in attain *Wibarne v. Rayne et al*, Hil. 5. & 6. Edw. 6. Rot. 121. where the first issue was entered *East. 5. and Rot. 527.*

And where the defendant will not pray judgment on a verdict found for him, plaintiff may against himself for the purpose of attaining the jury.

[Co. Ent. 655. b. S.C.]
2. Saund. 253. 254. 2. Keb. 535. 1. R. 3. 4. 2. E. 4. 10. 5. H. 7. 23. 21. Aff. 16. 12. 35. H. 6. 9. 44. Fitz. 107. g. Dier, 260. a. 312. a. 326. a. R. 217. 2. Ro. Ab. 97. [See the books in 14. Vin. 583, 584. and Palm. 281.]

Hilary Term, 3. Queen Elizabeth.

Kempe against Makewilliams.

* [195. a.]

(35) **QUEEN MARY** reciting in her patent a grant of the custody of the castle and other the premises, but not naming expressly any office of constableship &c. made by her father *in the thirty-third year of his reign* to the late *Lord Darcy* by the name of *Sir T. D. knight*, when in fact the patent was made *in the thirty-second year*, and concluded the recital with "*prout in the said letters more fully appears,*" adding these words: "*And because all and singular the premises are now in our hands and at our disposal by forfeiture or surrender thereof by the said Lord Darcy made, know that we &c. of our special grace, certain knowledge, and mere motion, in consideration of the good and faithful service &c. by Kempe &c. grant the custody of the premises*" (not naming it an office) "*for the term of his life, without any rendering &c.*" And the premises were enjoyed by *Kempe* five years quietly during the life of *Lord Darcy* and the said queen; after whose death the present queen granted the said premises as above to *Makewilliams*, who hath entered upon *Kempe*, and holden courts at the said hundred; and this entry was put in a replevin to be a disseisin to *Kempe* of certain lands parcel of the premises, where the

The queen in a grant of an office recited a surrender made to her of a former grant "*dated 33. H. 8.*" when in fact the grant was dated 32. H. 8. this misrecital vitiates the grant, and is not aided by 4. & 5. P. & M. c. 1. Surrender of a patent office without its being recorded during the life of the officer who took the surrender, or the patent cancelled, or a *vacat* entered on the enrolment, is void.

Co. Lit. 46. b. Roll, Cont. 71. 359. Dier, 116. b. 198. B. N. C. 364. 1. Inst. 46. b. Contin 356,

3. H. 6. 39. a. Br. Chal-
lenge, 9.

Supra, 176. a.

[Co. Lit. 157. a. Aleyn.
29. Bul. Ni. Pri. 306.]

7. H. 8. Kell. 174. 10.
Co. 67. b. 2. El. 176. a.
179. 167.

Surrender of a former
patent after the date of
a second which was
to commence from the
date, will not make the
second patent good.

Dier, 234, 255, 335.

Dp. 129. b.

R. 63.

* [195. b.]

beasts of the tenants of *Kempe* were distrained by the bailiff of *Makewilliams*; and divers of the hundred who owed suit to the said court were on the jury, and challenged by *Kempe* as within the distrefs of *Makewilliams* at the time of the disseisin: but whether the challenge to them in this case was good or not, the Court was of divers opinions. But at last it appeared, by examination upon a *voir dire*, that the said jurors never made their suit to the said court, and for this clearly they were sworn.

And for proof of disseisin *Kempe* gave in evidence a surrender made by *Lord Darcy* of his letters patent before *Sir Nicholas Hare*, then Master of the Rolls; but this surrender was not recorded by him, nor the patent cancelled, or a *vacat* of it made upon the enrollment, and no time certain when the surrender was made, for if it was after the date of the patent of *Kempe*, it cannot be good to make the patent of *Kempe* perfect. (36) And it was a doubt, whether such surrender as above without recording it till after the death of the said Master of the Rolls was good in law, or not. And *DYER* and *WESTON* thought not; and *LORD CATLYNE* and *LORD SAUNDERS* agreed to this, but *A. BROWNE* *à contra*. And further, the said insufficiency of the recital above, and the uncertainty by what means the said patent of *Lord Darcy* was void, were given in evidence to prove no disseisin to have been by *Makewilliams*, because for offices the statute made in the time of queen *Mary* [4. & 5 P. & M. c. 1.] for misrecitals &c. does not help, but they are excepted, and so patents of offices remain as they were at common law. And the truth of the case above was, that the custody of the castle of *Colchester* above was an office of constableness of the said castle, although there was not a word of this in the patent; therefore &c. And at length the jury gave a private verdict * against *Kempe*, s. that he was not disseised &c. for by their conscience and knowledge the patent of *Lord Darcy* was not surrendered at any time, nor to any person, notwithstanding it was agreed before the commissioners appointed to compound with the queen *Mary* for his offence perpetrated against her in the beginning of her reign; and also he was bound by recognizance in one thousand pounds to do it &c. And at length the plaintiff, s. *Kempe's* servant, was nonsuited.

Sir Gilbert Debenham and Another *against* Bateman.

(37) *MEMORANDUM*, That Sir Gilbert Debenham and Sir J. Wingfield, knights, brought an action upon the case by writ in *B. R.* against one Bateman of *F.* in the county of *Suffolk*, gent. for turning a water-course from a mill of the plaintiffs, whereby the water was hindered from running to the mill, to the damage of plaintiffs &c. The attorney of the defendant pleaded, after an imparlance, *non sum informatus*, whereby the plaintiffs remained undefended; whereupon the said plaintiffs ought to recover their damages by reason of the premises: but because it is not known what damages &c. a writ to enquire of the damages was awarded returnable the Term next following, at which Term it does not appear of record that any writ was served or returned, or any other judgment given than is above specified; and yet a *capias ad satisfaciendam* for eight pounds damages was awarded against the defendant, and an *exigent* upon that [returned] "*thrice exalted, and that he did not appear, and that no county court was holden more betwixen the receipt of the writ and the return of the same, on account of the shortness of the time.*" (38) And upon this another *exigent* was awarded with an *alloe' com.* and two other exactions were made upon that, and he did not appear; upon which by the judgment of the coroner he was outlawed, and the outlawry returned into *B. R.* And afterwards the defendant came in *gratis*, and rendered himself to the *Marshalsea*, to which he was committed: and immediately, without any writ of error brought by him, he made a general suggestion to the Court, that in the record and process aforesaid manifest errors had intervened, without shewing what in certain (note this), and prayed a *scire facias* against the plaintiffs returnable two Terms afterwards *ad audiend' errores*, and had it (note this); and he was let to mainprize to four, and each mainpernor bound in eight pounds to prosecute the writ of error with effect, and to pay the condemnation if &c. or to render his body to prison again. And in the mean time, s. in the next Term following, he sued a writ of error, as well in the judgment &c. as in the proclamation and process of the outlawry, *quæ coram nobis resid'*; and at the day of the *scire facias* returned served the parties appeared, and the plaintiff

If defendant be outlawed upon a *ca. sa.* where no *capias* lies in process, he may have error in the same court where the judgment was given. But where the error is the default of the court itself, as the want of a continuance, error *coram vobis* does not lie.

14. H. 8. 31. 21. H. 7. 35. 22. H. 6. 14. Plow. 467. Dy. 248. 1. Rol. Ab. 746. 44. E. 3. 6. b.

Dy. 223. b.

[4. Term Rep. 528, 529.]

40. Aff. 36. Dier, 175. b. 172. b. 16. H. 7. 2. a. 11. H. 6. 31. b. 22. El. 364. b. Fitz. 21. a. 20. b. 40. 42. 43. E. 3. 25. 11. 11. Plow. 248. 10. 11. 19. H. 7. 21. 25. ca. 9. 22. H. 6. 13. 3. R. 2. F. Execut', 93. Dier, 192.

[3. Bac. Ab. 749.]

[1. Crompt. Pract. 343.]

11. Co. 6.

* [196. a.]

27. H. 8. 15. a. 37. H. 6.

17. F. N. B. 21. b. 7.

H. 6. 28. F. Error, 16.

Dier, 123. 230. b. 201. a.

2. E. 3. 1. a.

[5. Com. Dig. 286.]

plaintiff in proper person assigned the errors specially. And first he assigned error in the process and proclamation of the outlawry, because no process of outlawry lies in the original writ and plea aforesaid; and then the *capias ad satisfaciendum* was * erroneous, and the outlawry upon it; for in this action upon the case an *elegit* or *feri facias* would lie. (39) And also he assigned a discontinuance in the first plea, *s.* because no day was given to the said plaintiffs when the writ of inquiry of damages issued. (*Quære* whether there should be one.) But it appears above that no writ was returned of damages &c. And it was demurred in law whether the writ of error lies upon this last error, because the Justices there cannot correct their own judgment; but the party has his remedy by parliament (*a*) only. And so upon good advisement as to this, the writ was abated and vacated. But for the other error in the awarding of the process above, and of the proclamation of the aforesaid outlawry, which was done before the coroners, the writ was maintained, and the outlawry for this reversed, and the party restored to the common law, and to all that which by it he lost: which note well.

(39) Error upon a judgment given in *Sbrewsbury* court upon default. The first error was, That upon the writ of inquiry of damages no day was given to the parties. 2dly, At the day of the return of the writ of inquiry of damages it was entered, "*the process being continued the jury is put in respite*;" which is on account of those juries which are † *impanelled* to try an issue, and not an inquest of office, as a writ of inquiry of damages; wherefore it shall be returned, that "*it is executed*," or that "*it is not executed*; idro "*vicecomes non misit breve*;" and there is no other form of entry. And for these causes the judgment was reversed.

See the case of *Daulx v. Paiton* in the Upper Bench in *Trin.* Term, 1650. fol. 1. [*Styl.* 216—218. 1. *Crompt. Pract.* 394.]

(a) It was not till the 27. *Eliz.* that error lay to the exchequer chamber from *B. R.* and that statute, c. 8. did not extend to er-

rors in fact. 2. *Crom. Pract.* 385, 386.

† Orig. in *parol.*

Sir Robert Catlyne's Case.

A purchases lands holden *in capite* to him and his wife and his right heirs: the king at his coronation pardons "all trespasses for whatsoever alienations made to him:" it extends to this alienation, though the wife be not named in the pardon.

Jenk. Cent. 5. c. 77. S.C. Br. Parliament, 43. 2. R. 3. 4. 7. a. 1. 5. 21. H. 7. 13. a. 33. 10.

(40) *SIR ROBERT CATLYNE*, Chief Justice, had purchased land holden of the queen *in capite* to him and his wife, and to the heirs of the said *Sir Robert*; and the queen pardoned him all trespasses and offences for whatsoever alienation made to him, without speaking of the wife; and his was the general pardon at the coronation. Note, Whether this pardon of this alienation made to him and his wife as above shall discharge the fine for the alienation, was much doubted in the exchequer. And afterwards, *s.* in *Michael-*

mas

mas Term in the third year of queen Elizabeth, upon great deliberation upon the Judges and Serjeants and the queen's Attorney, he was discharged, and the pardon allowed by the Barons of the Exchequer (a).

Plow. 334. 11. H. 7. 4. b. 14. 21. 24. H. 6. 26. 46. 30. 22. E. 4. 2. Dier, 122. 194. a. 249. a. Bro. Alienation, 8. St. P. 31.

(a) These fines for alienations are taken away along with knight-service by 12. Car. 2. | c. 24.

Rainsford against Smith.

(41) THE condition of an obligation was, that "if the "within bounden R. Smith pay or cause to be "paid to the within named W. Raynsford or to T. H. all "such summe or summes of mony as T. S. draper of C. de- "ceased standeth bounden by his deed obligatory unto the said "T. H. and E. P. of and for the behoufe of the children of "W. S. and T. Q. according to the will of &c. that then, &c." which being read &c. defendant pleaded *assio non*, because he says that the said T. Smith never was bound by any writing obligatory of his to the afore said T. H. and E. P. of and for the behoof of the children of W. S. and T. Q. and this &c. And to this plea the plaintiff demurred: and by the opinion of the Court this is no bar, because he shall be

M. 2. & 3. Reg. Eliz. Rot. 828.

The obligor of a bond conditioned for the payment of all sums for which A. stands bound by deed to B. is estopped from pleading that A. was never bound by any deed to B.

6. Co. 30. 36. Br. A. verment, 29. 2. E. 4. 53. Estopp. 19. 33. 34. 37. H. 6. 38. 19. 5. a. 2. Co. 4. 33. b. 18. 21. E. 4. 4. 54. b. 28. H. 6. 7. a. Dier, 183. 39. 10. 28. 33. H. 6. 48. 60. 8. 2. 10. 2. 9. E. 4. 25. 29. & 31. a. 49. E. 3. 15. Mo. 23. 1. Rol. Ab. 872, 873.

(41) Mich. 38. Eliz. B. R. In Williams' case, this matter was resolved according to this Book; and 18. Eliz. where the bond was to prosecute an information in B. R. against such a person, the defendant said there was no such information, and plaintiff had judgment.

Mich. 18. Eliz. B. R. In Corrauts' case. In debt, the condition of the obligation was, if the defendant should suffer the plaintiff to enjoy his right in such a land; defendant pleaded that plaintiff had no right; Ash, for the plaintiff, demurred; and the Court thought it a good plea, and that Ash was rash. And WRAY said, that one RAMSEY, who was a learned man, lost his credit for hasty demurrers; but if it had been "whereas the "obligee had right," it would have been otherwise.

19. El. Com. Baron Tanfield's Rep. 51. I am bound in an obligation to release to one all the right I have in W. acre. I may say that I have no right: otherwise would it have been, had it been to release the right that I have for life in W. acre.

Hil. 4. Jac. In Wren v. Cistell. In debt on bond of twenty pounds, the condition of which was, if the obligee may fetch and carry all such parts of marle as he ought of right to have in a marle-pit called &c. that then the obligation should be void; defendant pleaded, that the obligee had not, nor of right ought to have any marle there; and it was adjudged, four Judges only in court, that it was a good plea, and that the recital is not an estoppel; but otherwise if the condition had been special, as here in Dyer.

Between Paramour and Deering, in 37. Eliz. [Mo. 420] it was ruled, That where the condition of a bond was to perform all legacies that J. S. has devised by his will, there it is no plea to say "that he has devised no legacies;" but it would have been otherwise, if the condition had been to perform all legacies that he shall devise by his will (a).

East.

(a) In Moor this was held to be good, but that he should be estopped to say that J. S. did not make a will. The several cases in this note, which are a little confused in the original, are corrected from 3. Danv. Ab. 269, 270. & 10. Fin. Ab. 466. 468. where

they are all collected, with many others. See also 1. Str. 610. 5. Burr. 2740. 2. Black. Rep. 1152. 1. Term Rep. 701. 2. Term Rep. 169. 3. Term Rep. 438. 441. 2. Br. Cas. in Ch. 248. 4. Bac. Ab. 107, 108.

estopped

estopped from denying the special matter, which is matter in writing, and not naked matter of fact: and so it was adjudged &c.

East. 38. El. B. R. but entered 37. *El. Rot. 66. Stroud v. Willis*, [*Mo. 408. Cro. Eliz. 361.*] Upon error in *C. B. S.* granted *all such land as he holds in D.* for his life, and made an obligation &c. and it was holden that he is not estopped, but that he may say "*that he has no land in D.*" *Sey's Lib. pl. 206. 309.*

East. 42. El. B. R. Willowby v. Brocke, [*Cro. Eliz. 756.*] Debt on bond, the condition was, that *whereas A. had commenced certain suits in B. R. against B.* that if *B.* without delay should appear by attorney, and make answer to the actions and declarations &c. Defendant pleaded that *B.* appeared, and was ready to answer, but that "*then there were no actions depending.*" *Per Cur.* It is no plea, but he shall be estopped.

East. 2. Car. B. R. [*Noy, 79. Litch. 125.*] between *Germ. m* and *Bandall*. The difference agreed where a thing is recited in general words and where in particular.

* [196. b.] * Harwood et Al', Executors of J. Colbourne,
against Lee.

H. 2 Reg. El. Rot. 973.

Whether the custom of foreign attachment in the city of London holds between a citizen and a foreigner.

[*Co. Ent. 140. b. pl. 20.*]

17. 21. 22. E. 4. 7. b.
67 a. 30. b. 1. E. 4.
6. a. 22. 35. 39. H. 6.
47. b. 27. a. 19. 5. Co.
80. Reg. 539. 5 H. 7.
20. Hob. 86. 31. 41.
21. H. 7. 21.

[*3. Wilk. 300, Lex Lond. nensis, 126. Dougl. 379.*]

[*Cotton's Records, 165, 166. 288, 289. 294.*]

3. Cro. 353.

[*2. Show. 372. 507. Carth. 26. Comb. 109. But see 3 Lev. 23.*]

(42) A CITIZEN of London is indebted to a foreigner on bond, and the obligee is indebted back to the same debtor on simple contract, and the obligee makes his executors and dies. The obligor, by the custom of London, shall have an action of debt against the executors of the obligee in *L.* upon his oath that that is a due and true debt that the testator owed to him in his life-time; and upon a *nihil* returned, *nec est inventus*, he may make attachment of the debt which he detains from the executors of his obligee for his own debt upon four defaults recorded according to the custom of foreign attachment, and surety found by mainprize, that if the executors within a year and a day cannot disprove the debt, or reverse the judgment, &c. he shall be discharged of so much of the debt which he owes by the bond. *Quare* well, whether the custom (although it is confirmed by the authority of parliament generally among other customs of the city in the 7th year of Ric. 2.) be good and legal, or not; and whether it holds place as well among foreigners as citizens &c. because it was demurred to in law; and divers apparent defects were noted in the plea; and one especially, *s.* because whereas it was alledged, that the custom was, that

Trin. 18. El. C. Ward. in *Lib. Decret. ibid. fol. 513.* * *George Chamber* was bound to *Paul Gresham* for payment of one hundred pounds, and the said *Paul* was bound to the said *G.* in two hundred pounds, which bonds were both forfeited. and the said *G.* in London made attachment of the debt of one hundred pounds in his own hands for the aforesaid debt of *P. G.* and had judgment upon it accordingly, and afterwards assigned this bond to the queen; which was in debt &c. [*Cro. Eliz. 186. 2. Rot. Ab. 554. acc' 3 & Privileg. Lond. 268.*]

the debt should be affirmed by the oath of the party in the court of *Guildhall*, this was pleaded to be made in the court of the sheriff in the Compter, where the plaint was first affirmed and levied, and where judgment was given, which judgment also was, that plaintiff should have execution of the debt attached in his own hands, without any judgment that he should recover the debt &c. At length the parties agreed by the means and at the request of the recorder and counsel of the city aforesaid. A like matter in *Enst. 7. Eliz. Rot. 1540. [Co. Ent. 142. a.]* between *Marshall and Wilkinson, & H. 8. fol. [247. a. pl. 73.]* & *H. 4 18. Rot. & M. 4 18. fol. between Makeworth and Browne* in the county of *Nottingham*, where for not averring the finding of pledges according to the custom the plea was insufficient.

1. Ro. 554.

5. Co. 83. a.

43. *Eliz. in C.B.* It was said for law *per Curiam*, that a man by the custom of *London* cannot attach a debt in his own hands, for that which is in his own hands cannot be said attached: and it was also said that the custom is good only between citizens, and does not extend to strangers.

Sir G. Speake, Knight, against Hungerforde.

(43) IF a man bail a sum of money as a gift or loan to one *A. B.* to deliver over to the donee or borrower, and he deliver it accordingly; and yet afterwards *A. B.* be impleaded as receiver for an account by the bailor, and he plead *unques son receiver &c.* he shall not give this matter above in evidence, nor shall the verdict have regard to it, because he ought to have pleaded the special matter; for once he was conditionally accountable, namely, if he had not delivered over the sum. And also he cannot plead it in discharge before auditors; and this * by divers. And this case was by *nisi prius* before me this Term in *Guildhall, London*, between *George Speake*, knight, and *Hungerforde*.

Nisi prius son receiver is a bad plea, in account, by the bailor, for money delivered to the defendant to bail over, which he has done, for he must plead it specially; but he cannot plead it before auditors.

[Cro. Car. 216. 2. Will. 102. & 1. Comm. D.g. Account. (E. 6.) (E. 11.) and the 2. 3f. Cal. in Ch. 336. See alio Bul. Ni. Pr. 120.] 19. H. 6. 3. 1. Rol. Ab. 122. (M.) 1. 2. 126 (22.) 21. H. 7. 34. Dier, 89. 4. 12. H. 4. 10. 4. 41. E. 3. 31. 22. H. 6. 49. 5. 12. E. 4. 4. 12. 12. H. 8. 2. 1. E. 5. 2. 2. 9. E. 4. 25. b. 16. E. 3. Ac. count, 53. 2. Ro. Ab. 683. 3yl 354. 420.

Easter Term,

3. Queen Elizabeth.

Lord Dacres against Laffells.

Where the king's debtor taken in execution for debt in *B. R.* is brought up into the exchequer by prerogative writ *rescued* prior to the arrest, and committed to the Fleet in execution for both debts; *B. R.* having him brought up by *habeas cor.* will remand him.

[16. Vin. Ab. 515.]

2. Rol. Ab. 158.

1. Inst. 131. b.

Dier, 67. b.

41. E. 3. Execution,
38. Roll. Continuance,
296. Ben. 118.

7. H. 6. 42. a. Dy.
192. a.

Dy. 152. a. 245. b. 297.
a. 307.

24. 29. E. 3. 46. 13.
and 47. b.

[Barnes, 223. Salk.
350. Ld. Raym. 789.
2. H. H. P. C. 145.]

* [197. b.]

(44) *M E M.* That in *Michaelmas Term* last past a *capias ad satisfaciendum* for three hundred and twelve pounds recovered in *B. R.* by *Lord Dacres* against *Laffells* was awarded out of the said court directed to the sheriffs of *London* returnable in the same bench, by virtue of which he was arrested; and before the day of the return there came a writ of prerogative out of the exchequer, reciting a debt of one hundred pounds due to the queen by *Laffells*, and in the same writ a *habeas corpus cum causâ* of the caption and detention was awarded to the said sheriffs of *London*, which writ bore *teste* one day before the arrest, and was returnable before the day of the return of the said *capias ad satisfaciendum*; at which day the sheriffs brought the body into the exchequer, and shewed the cause of the said arrest and detainer, to have the body *ad satisfaciendum* in *B. R.* at the said day of the return there by virtue of the aforesaid writ. And in the exchequer *Laffells* was charged with the debt to the queen, and could not deny it; and upon that at the request of *CARUS* (counsel for *Lord Dacres*) the Court awarded that *Laffells* should be committed to the Fleet to remain there in execution for both debts, and the sheriffs of *London* discharged of the body. And so he was in the Fleet until a *habeas corpus* was directed to the warden of the Fleet out of *B. R.* *cum causâ*. And there, at the day of the return, the warden brought the body, and shewed all this matter in his return as above; and from thence *Laffells* was re-committed to the Fleet, there to remain in execution until the said *Laffells* as well the said debt to our lady the queen, as the said three hundred and twelve pounds to the said *Lord Dacres* should fully satisfy &c. * And this is abstracted from a copy of the record which is entered in the exchequer in *Michaelmas Term* last, *Rot.* 150.

Hunt against Coffin.

(45) **I**N *Trinity Term* 10. [H. 8.] a *scire facias* was awarded to the sheriff of *Middlesex* at the suit of one *Hunt*, the patentee of the said king of a parkership and herbage of the park of *Combe Martine* in the county of *Devon*, against *William Coffin*, who was also a patentee of the same king of the same park &c. by a later patent; wherein the former patent of *H.* was fully recited in the writ, and that he was amoved and expelled by *Coffin* by colour of the said last patent, of which he made only a slight mention, unjustly, to the damage &c. without any cause expressed to have the patent revoked and annulled. And upon the *scire facias* returned, and that he did not know any thing to say, nor did deny, nor could deny the record, but that the aforesaid letters to him made ought to be revoked and annulled, judgment was given by Cardinal *WOLSELEY*, *Chancellor*, with the advice of the Judges and King's Serjeants, &c. that they should be revoked, &c.

Scire facias by the first patentee to repeal a subsequent patent of an office of parkership.

[Jenk. 126. pl. 56.]

2. Ro. Ab. 191, 2. Finch. fol. 77.

6. E. 4. 9.

6. Car. Cro. 198. Mo. 449.

37. H. 6. 14. 2.

Rex against Toly.

(46) **I**N *Michaelmas* 14. H. 8. a *scire facias* was awarded to the sheriff of *York* against one *Toly* an auditor of *Warwicke Spencers* and *Salisbury*, lands in that county, who by the act of general surveyors, about the 7th year of H. 8. ought to shew to the surveyors in reviewing, their accounts before the end of *Hilary Term* every year, upon pain of forfeiture of his letters patent and office: for non-feasance of this, this *scire facias* issued at the suit of the king, and being returned warned, he made default; upon which judgment was given for the forfeiture, as above, and that the letters patent, together with the enrollment of them, should be had for none, and should be wholly vacated; and it was so.

Scire facias to repeal the patent of auditorship forfeited for not passing his accounts according to statute.

[33. H. 8. c. 39.]

Raft. Courts. Dier, 211. 2.

[2. Term Rep. 554-557.]

Rex against Blage.

(47) **I**N *Hilary* 15. H. 8. it appeared that *Robert Blage* was the remembrancer of the king in the exchequer by patent for the term of his life to be occupied by him or

Scire facias to repeal the patent of the office of king's remembrancer in the exchequer.

Keilway, 136.

[Ante, 176. pl. 28.]

Rol. Contin. 359.
 Dier, 219. Godb. 419.
 Bro. Estates, 20.
 11. H. 4. 77. a. 37.
 H. 6. 26. 3. 11. Aff.
 9. E. 4. Co. 79.
 1. Sid. 81.

6 11. Co. 36. 4.
 Dier, 195. 27. Aff. 1.

If a remembrancer of the exchequer be made abaron of the exchequer, the first office becomes void.

* [18. a.]

[See ante, 158. b. 159
 a. pl. 34. and the cases
 there cited in the mar-
 gin.]

his sufficient deputy, which patent was granted by H. 7. in the 18th year of his reign; and in the 31 year of H. 8. the said *R. Blage* was made the third baron of the exchequer, and his patent of this was only *quamdiu se bene gesserit in eodem officio Baron*; and yet it seems that he continued in the exercise of the said office of remembrancer by deputy: and in the 7th year of H. 8. the king at the request of the said *Baron Blage* granted a patent of the said office of remembrancer to one *B. Blage* his son, for the term of his life, *habendum* immediately when first and next after the death of the said *R. B.* his surrender, or dissolution, or by any means whatsoever and whensoever it should happen to become vacant.

And for that these letters patent were insufficient and not good, because the said *R. B.* had no legal estate at the time of the making of the same, or at any other time after the said *R. B.* * was constituted third baron, &c. a *scire facias* issued for the king in *Middlesex* to annul and revoke the last patents &c. And upon the *scire facias* returned and default made, the judgment was given accordingly.

Shuttleworth in the argument of *Knighi's* case, in the exchequer, 30. *Eliz.* [reported 3. Leon. 124. Mo. 199. 1. Co. 54. 1. And. 173. Gouldf. 15. 19.] cites this case to be adjudged 4. and 5. *P. and M.* viz. An abbot made a lease for years rendering rent; the king granted this land coming to him by the dissolution, to one and his heirs; and adjudged that the reversion passed, but that the rent did not pass.

Rex against Eston.

Scire facias to repeal the patent of the office of serjeant at arms for not attending his office.

9. Co. 98. b.

7. Co. 34.
 Plow 379.
 9. Co. 99.

(48) **A**LSO in *Trinity* 26. H. 8. a *scire facias* was awarded for the king to the sheriffs of *London* to annul and vacate and restore to be cancelled the letters patent of the king made to *John Eston* of the office of one of the serjeants at arms, with a fee of twelve-pence *per diem*, for the term of his life, because the said letters patent were made to the intent that the said *J. Eston*, in the exercise of his office aforesaid, on and with the chancellor of *England* for the time being, and not elsewhere, for the business of the king from time to time should continue, and wholly attend; and as he, so others having the said office for the exercising of the same, were accustomed to walk: and the said *J. Eston* from the exercise of the same with the said chancellor absented himself, so that the said businesses of the king remained undone, in contempt of the king, &c. And upon two *nibils* returned and

and default, judgment was given accordingly, and that the office, as forfeited, should be seized into the hands of the king, and should be adjudged &c.

[See] Dier, 168. a.
[2. Term Rep. 554.
557]

Penwarren *against* Thomas.

(49) **A**LSO in Hilary 28. H. 8. a *scire facias* issued to the sheriff of *Middlesex* at the suit of *John Penwarren*, who was bailiff of the hundred of *Caryer* in the county of *Cornwall* by inheritance in fee-simple, and was expelled from the office of bailiff, &c. by *Henry Thomas*, by colour of letters patent of the king to him of the said office made for the term of his life; and upon the *scire facias* returned, and *nihil dicit*, the letters patent were revoked and annulled, and the said *Penwarren* restored to the possession of the said office together with the issues, with a saving of the right of every man.

Scire facias for the office of bailiff of an hundred.

(50) **A**ND so note by these precedents, that always there where two patents of the same thing are, the *scire facias* is suable by the ancient patentee against the new one to have the new patent cancelled: and so it was in 6. E. 4. [8. b. pl. 20, 21.] where both patents were of the reversion of the office of clerk of the crown in chancery, and to take effect both at the same time, and the second patentee obtained possession of the office first, and disturbed the first patentee, wherefore he sued the *scire facias*. And see there a good form of the writ &c. And so it was in the year 20. H. 6. [8. a. pl. 17.] for an office in *Ireland*, forfeited for the non-exercise of it in proper person by authority of the parliament of *Ireland*, the former patentee brought *scire facias* against the latter to repeal, &c. But I gather from the precedents above, that where there is only one patentee who has committed a cause of forfeiture, of which office the king has not made yet any new patent, there the patentee shall not be ousted by the king except by *scire facias* at the suit of the king: and the reason of this is, as it seems, because he who is in and placed in an office * by matter of record of which the king himself has notice, ought not to be removed except

Where there are two patents of the same office, the last patentee may be removed by a *scire facias* sued out by the first patentee. An officer of record cannot be removed even by the king for a forfeiture without a *scire facias*.

Co. Jur. Courts, 88.
4. H. 6. 12. b. 15. E. 4.
7. a. 9. H. 8. Cro.
195. 10. El. 277. 2.
20. 37. 39. H. 6. 8. 14.
a. 33. a. Br. Scire facias, 175. D.

2. Rol. Ab. 191. con.
Inf. 211. a. 1. S. d. 82.
Dier, 151.

* [198. b.]

[3. Bac. Ab. 743.]

5. E. 4. 112.

Where *sci. fa.* to repeal a patent is sued by the king, the cause of forfeiture is inserted; *contra* at the suit of a subject.

[3. Bac. Ab. Offices, M.]

4. Bac. Ab. 416. 17.

Vin. Ab. Prerogative of

the King (S. b.) (T. b.)

(U. b.) (X. b.). Com.

Dig. Patent (F.).]

by matter of record, *s. by scire facias*, and avoidance of the letters patent thereof &c.

See a similar matter *post*, fol. [210. b. pl. 28.] between *Robert Chester, knight*, and *Lord Hastings of Loughborough*. And note above, where the *scire facias* issued at the suit of the king, the cause of the forfeiture of the thing is mentioned in the writ, but not so in the other *scire facias*'s sued by one patentee against another.

The plaintiff cannot relinquish his challenge of a juror on his being also challenged by the defendant.

3. H. 6. 38. 8. H. 4.

21. B. 8. 110. 9. H. 5.

10. 14. H. 7. 5. 27. H.

8. 2. acc'. 20. Afs. 13.

24. H. 7. Cro. 102.

37. H. 6. 8. b. 9. E. 4.

16. acc'. [2. St. Tr.

313.]

(51) **A** JUROR was challenged by the plaintiff, and immediately the defendant challenged him also; and before the Court had ordered him to be withdrawn, the plaintiff would have relinquished his challenge. And by the opinion of the Court he cannot: to which CATLYN, *Chief Justice*, CORDELL, *Master of the Rolls*, and GERRARD, *Attorney General*, assented. But LENNARD, *Prothonotary*, and the other clerks also, held the contrary.

Upon the *disfringas* in attain the sheriff impanelled the jury, but did not return them till the effoign day of the return next following that of the writ; and though the parties requested the Court to take them, the jury were discharged, and the sheriff amerced.

(52) **N**OTE, A distress in attain was returnable the first day of this Term in C. B. *s.* at the quinsime of *Easter*. And the sheriff at the request of the plaintiff (and because there were not enough of the grand jury come on the said day), with-held the writ and the return till the *Monday* next following, which was the effoign day in three weeks of *Easter*, at which day the writ with the panel served was returned; and the jurors of the grand jury appeared, and both parties requested the Court to take the jury; and the Court would not, but re-delivered the writ again to the sheriff, and amerced him twenty pounds, and discharged the jury.

The lessee of a house and wood covenanting to repair at his own costs, and cutting trees for the repairs, may justify under his lease in an action of waste. The lessor must resort to his covenant. So if the lessor had covenanted to repair and did not, les-

(53) **A** LEASE was made of a house and certain land and wood with it by indenture, and the lessee covenanted to repair the house in all things at his proper costs and charges; and afterwards the house was decayed in the groundfells, and the lessee cut trees growing upon the land, and employed them upon the repairs as above: and in waste for cutting the said trees, defendant justified by the lease as above,

above, and the plaintiff would have charged him in his replication by the said covenant. And by the opinion of the Court he cannot do this, but is driven to his writ of covenant; to which CATLYN, *Chief Justice*, and SAUNDERS, *Chief Baron*, assented. The law would be the same, if the lessor had been bound by the covenant that he should repair the house &c. and did not do it, but the lessee had done it, and cut the trees for it, as above, he is justifiable.

see cutting trees for repair may justify.
Mo. 23. Turner's Rep. 121. S. C. Br. Dett. 236. 3. H. 7. 4. Hob. 178. 173. Jenk. Cent. 4. c. 64. 12. H. 8. 1. a. 14. El. 314. a. 44. E. 3. 21. a. 5. E. 4. 8, 9. Dier, 35. a. 43. E. 3. 6. b. 40. 49. E. 3. 6. 1. 14. H. 4. 27. 8. E. 4. 2. a. 12. H. 3. 1. b. 27. H. 6. 10. 11. Co. 82. a. [Co. Lit. 53. b. 54. b. Brownl. 240. And see Bul. Ni. Pr. 120.]

* Lawrence one &c. against Netherfall.

* [199. a.]

(54) ONE Netherfall was sued in Kent in trespass by LAWRENCE, *Attorney of the Bench*: and upon the original writ, through malice, he procured the sheriff to make the return thus, *s. The within-named Netherfall is attached by his chattels to the value of ten pounds*, and does not shew the chattels specially; and this ten pounds was estreated and put into the exchequer, and process there issued to levy it; and by the opinion of the Court, this return was uncertain and insufficient; for the chattels by which the defendant is attached are forfeited to the king at the day of the return, if he make default, which see 21. E. 4. fol. 93. [78. a. pl. 16.] And then by search this entry was seen by the Court, Mich. 18. H. 6. Rot. 428. "*Norfolk s. Roger Harfwike, knight*, by his attorney offered himself on the "fourth day against *John Porter &c.* of a plea that he render "to him a certain writing obligatory, which he unjustly "detains from him &c. and he came not, and it was commanded the sheriff that he should attach him &c. and the "sheriff now returned that he was attached by one horse of "the price of twenty shillings, therefore the said horse is forfeited to the lord the king, and it is commanded to the "sheriff that he distrain him &c." And this precedent was ordered by the Court to be observed and used in the margin of the roll as here, by all the philazers.

In trespass, the sheriff returning to C. B. "that "defendant is attached "by goods to such a value," is bad; he must specify what things he attaches, as they are forfeited to the king on default.

1. And. 51. } S. C.
3. Cro. 13. }
44. E. 3. 10. 1. Keb. 819.

[Gilb. Distresses, 18. Dalt. Sheriff, 155, 156. 2. Lutw. 1457. Carter, 224, 225.]

Attachment in Assise, B. 3. and 10.

9. H. 7. 6. a. 7. H. 6. 9. b. 3. 8. E. 4. 20. 24. b. 34. H. 6. 29. a. Dier, 121. b. Catal. Forisfact. 20. a.

Bendish, 269.

Hil. Ult. Rot. 734.

Galle against Galle, Widow.

A. levies a fine come ceo to B. who renders back to A. in tail, remainder to himself in fee. On the death of A. without issue, B. is driven to his form don; he cannot have a scire facias in the remainder because his estate is a reversion; nor in the reverter, for it is a fine executed.

[Dal. 29. pl. 4. S. C. 28. Vin. Ab. 375]

9. Co. 93.

1. H. 5. 8. Dier. 9. 134. 172. 237. 328. 362. 3. Mar. 156. b.

4. E. 6. 69. b. Dier. 227. a. 3. H. 6. Scire Facias, 22. 28. 40. 43. B. 3. 20. 12.

* [199. b.]

12. H. 6. 21. b.

8. E. 3. 44. Scire Facias, 22. 28. 40. 43. Bro. Scire Facias, 18.

(55) *SCIRE facias* to execute a fine was brought by *George Galle* against *Joan Galle*, widow, upon a fine levied in *Hilary* in the 2d year of the present queen, which was between the aforesaid *G. G.* the plaintiff and *Thomas Gale* deforciant, by which fine the said *Thomas* acknowledged the tenements &c. to be the right of the said *George*, as those which the said *G.* had of the gift of the said *T.* and remitted to him &c. and *G.* granted and rendered back the same tenement to *Thomas* and to the heirs male of his body begotten, to hold of the chief lords &c. and if it should happen that the said *T.* should die without male heir, then after the decease of the said *T.* that these tenements should wholly remain to the said *George* and his heirs for ever, quit of the other heirs of the said *Thomas*, to hold of the chief lords &c. and this was the tenor of the fine. And because *T.* was dead without issue male, *G.* brought a *scire facias*, and the writ was *quare tenementa predicta eadem G. remanere non debeant*, and whether it should be *reverti non debeant* in this case (because the remainder cannot be well limited to himself by the fine in fee-simple), was moved. (56) Also it was moved that no *scire facias* in the *reverter* would be maintainable on this fine, which supposes the reversion to be executed as above; but that he shall be driven to a *formeden in reverter*: and the precedent of the *scire facias* in the *reverter* of 18. *H. 6.* [20. b. pl. 4.] was inspected for this case, which is in *T. 18. H. 6. Rot. 111.* which was thus, *s.* that the three * deforciantes should grant and render the corrody to the plaintiff in tail, with divers remainders over in tail, the reversion to the grantors and to the heirs of one of them in fee, without any *conuzance de droit come ceo que &c.* at the beginning. And the heir of him who had the fee-simple limited to him brought a *scire facias*, supposing all the tails spent: so there seems a difference between the cases. And the opinion of the Court was against the plaintiff.

(55) *Mich. 13.* and *14. Eliz. Rot. 2087.* with an *alias prout patet East. 5. El. Rot. 1028.* upon a fine levied by one *William Sands* and *Margery* his wife and *Edmund Bray* to *Henry Frowicke* and *John Hull*, 2. *H. 8.* with grant and render to *Edmund Bray* and the heirs male of his body, remainder to *Margery* and her heirs, *Will. Lord Chandos* brought a *scire facias* in remainder as heir of *Margery* after the death of *Edmund* without issue male, and had judgment of divers manors. [Vide post. 215. b. pl. 53.]

If this case was not by fine, there could not be a tenancy created between the donee in tail and the lord paramount, *Perk. 637. 2. E. 4. [5. b. pl. 11. 6. a.] Plow. 237, 238.* although the king be chief lord, but because it is by fine, *quare. Perk. 664. Bro. Tenures, 67.*

Parton *against* Mason.

(57) **TRESPASS** by *Humphrey Parton against T. Mason* and others for one ox of the price of five marks at *B.* in the parish of *G.* taken and led away; defendant justified the seizure and taking by a custom within the manor of *B.* in the county aforesaid, that the lord of the manor for the time being had and was accustomed to have the best beast of every tenant dying seised of any messuage holden of the said manor upon that messuage after his death, without saying "for an heriot," or "in the name of an heriot." And also that there is another custom within the said manor, that if the best beast of the said tenant be eloiigned before the seizure of it by the lord or his servant, that then the lord hath been accustomed to seize and take the best beast of any other being *levant et couchant* upon the said tenure: and shewed that the best beast of the tenant, which was an ox, after his death was eloiigned before the seizure of the lord or his servant, wherefore he seized and took the said ox of the plaintiff being *levant et couchant* &c. and did not say "for an heriot," or "in the name of an heriot," &c. and did not aver that the tenant died upon the messuage. And upon this matter the plaintiff demurred. (58) See for the definition of an heriot in *Fleta*, lib. 3. c. 18. "*Herietum est quedam præstatio ubi tenens liber vel servus in morte sua dominum suum reficit de meliori averio suo vel de secundo meliori, quæ quidem præstatio magis fit de gratiâ quam de jure, et nullam habet comparationem ad relieuum eò quòd hæred non contingit, quia factum est antecessoris.*" And by the opinion of the Court, the plea above was not good for the matter of the prescription, nor for the form.

A similar matter was in *Mich.* in the third and fourth year of the now queen, *Rot.* 1496. [Moor. 16. pl. 58.] and a demurrer as above; but there the custom is first alleged, that the lord of the manor was used and accustomed to have the best beast of the tenant after his death; and it is further ac-

Palsch. 2. Reg. Eliz. 932.

A custom that the lord may seize the best of a stranger *levant et couchant* upon his tenant's land by way of heriot, if the best beast of such tenant be eloiigned at his death, or he die without best, is bad.

In justifying under a prescription for a heriot, defendant must plead that he seized &c. for, or in the name of a heriot.

7. E. 4. 18. b. N. B. 667.

Owen, 146.

Davis, 33. a.

2 And. 153. Palm. 342.

Plow. 95. b. 27. Aff.

24. 35. H. 6. 25. b. 28.

by Mole. Br. Customs, 74

5. E. 4. 72. 5. H. 7. 9.

Benl. 39.

Between Thomas Wilson, plaintiff, and Humphrey Vaise, defendant. [Dal. 61. Benl. 110.]

(58) *Perkins' and Cumberford's case*, 41. *El.* [2. *Rel. Ab.* 266. *Cro. Eliz.* 725.] was, That the custom of a manor was, that the lord should have the best beast or thing of every one who died within his manor; and it was adjudged as to a stranger to be a void custom, but binding as to the tenants. The lord of a manor cannot prescribe that if any stranger chase an estray out of his manor, that for this he shall be amerced in the court of the manor. This prescription is void to bind a stranger, 29. *H.* 8. in *Benloe's Rep.* [23. pl. 38.]

M. 3. and 4. *Eliz. Rot.* 1496. *Wilson v. Wife.* adjudged accordingly that the custom is bad. And so it was adjudged between *Pyne and Bennet*, 18. *El. Rot.* 1468. *Benloe* [302.]

customed

21. 21. H. 7. 14. 40.
2. H. 4. 24. Davis, 33.
29. Aff. 24. 1. Roll.
Ab. 561. Litt. 212.
Such a prescription holden unreasonable to bind a stranger: but if it had been that the lord should distrain the best beast of the tenant *levant et couchant*, it seems this would have been good.
21. H. 7. 40. 2. E. 4. 6.
[2. Com. Dig. 518. 520.
1. Bac. Ab. 673. Cowp. 62. Dougl. 218.]

customed that if the tenant has no beast at the time of his death &c. or the best beast be eloiigned after his death before the lord can seize, then the lord may seize and take the beast of any other person there *levant et couchant* to his own proper use. Which custom seems to be * repugnant to the first custom, and is a several custom by itself. And he alleged that the tenant had no beast at the time of his death there; wherefore &c. At length in *Easter Term* in the 6th year of the present queen, by the opinion of all the Justices of the Bench, the custom was holden void and unreasonable.

A man before the statute of uses enfeoffed his wife and others to the use of himself and wife for life, &c. On his death after the statute, whether the wife shall be in possession under the feoffment, or by force of the statute.

[Co. Lit. 112. a.]

Note, that she shall not be intended his wife at the time of the feoffment.

4. Co. 29. Noy. 124.

[Co. Lit. 187. b.]

28. Aff. 4. Br. Dower,

62. That a fine to the wife is void.

Dy. 240. 11. H. 7. 7.

Br. Jointure, 64.

24. E. 4. 1.

(59) A MAN seised in fee enfeoffed certain persons and his own wife in fee by a charter indented, bearing date the last day but one of *April*, in the 21st year of *H. 8.* to the use of the feoffor and his said wife, and of the heirs of the feoffor. And after the statute [of Uses], *s.* in the 30th year of *H. 8.* the husband bargained and sold the land, and covenanted by indenture of bargain and sale that the land should be discharged of all jointures and incumbrances before a certain day, and was bound by obligation to perform this: and the wife survived the husband, and lived until the day was past; wherefore the vendee brought debt upon the bond, and in the replication assigned the breach in the said covenant by the making of the said jointure by the charter aforesaid in form aforesaid; to which it was rejoined, that nothing of the tenements aforesaid by the charter aforesaid ever passed into the possession of the said wife of the feoffor; and of this he puts himself upon the country, and the said plaintiff likewise. (60) And in evidence to maintain the issue on the part of the plaintiff at the assizes, plaintiff by his counsel shewed to the jury that the said husband was seised of the land above in fee, and being so seised, by his charter bearing

7. Jac. In Cur' Wardorum. *Samin's case* [Ley. 11. 13. Co. 54.] by the two Chief Justices and the Chief Baron, that in this case if a feoffment be made to a husband to the use of the husband and wife, they are joint-tenants, and no ward.

Hil. 43. El. C. B. between *Reading* and *Norris* in *ejectione firme* upon a feoffment to a daughter and two others to the use of the daughter and the heirs of her body, adjudged that the daughter here had a fee. And SERJEANT HARRIS vouched such case to be a fee-tail for the whole, but it was afterwards reversed for this in *B. R.* and adjudged a fee, and here the daughter and others adjudged tenants in common, for the feoffee to the use of himself took by livery, and not by the limitation of the use. And this case being reported at the *Reading* in *Lincoln's Inn*, *Lent 1632*, *Harrison*, lecturer, took a difference between this and *Samin's case* before cited, for there all the fee passed to the same parties, and therefore they are joint-tenants; it is otherwise here, for the benefit of the remainder.

date the last day but one of *April* in the twenty-first year of the reign of king *H. 8.* under-written, brought into court and shewed to the jury in evidence of the said tenements enfeoffed one *A. B.* and one *C. D.* which were the names of the persons mentioned in the pleading, and omitting the name of the wife of the feoffor, *habendum* to them and their heirs to the use of the feoffor himself and of the within-mentioned *A.* then his wife, and the heirs of the feoffor himself, by virtue whereof they were seised to the said use until the 4th day of *February* in the 27th year of *H. 8.* on which day by virtue of the act &c. the husband and wife were seised in demesne, *viz.* the husband as of fee and the wife as of freehold; and concluded with a "*and this he shews to prove the issue &c.*" without averment that the deed which was shewn in evidence was the deed mentioned in the plea; and upon this matter it was demurred in law by the defendant; and whether the possession of the land vested in the woman by the charter, or by the statute of uses above, was the question.

Dy. 249. b. fol. 32.
Plow. 3. 'Br. Forme-
don, 49.

* Martin against Harrison.

* [200. b.]

(61) **NOTE**, Upon the *poslea* between *Martin* and *Harrison* it appeared that at *nisi prius* a full jury appeared, of which there were only two hundredors who were sworn upon the principal, and the rest all are out of the hundred; upon which, and for default of the residue of the jury, the plaintiff prayed a *tales* of two hundredors *de circumstantibus*, according to the statute [35. *H. 8. c. 6.*]; and the sheriff returned there only two hundredors, who were annexed to the first panel, and sworn upon the principal also; so that having now four hundredors, resort was made to the jurors who were of the first panel out of the hundred, and eight of them were sworn *seriatim*. And they found the issue for the plaintiff. And this matter was alleged in arrest of judgment, *s.* that the trial should have been by ten *de circumstantibus* and the two jurors who were first sworn, without having made any resort as above. *Sed non allocatur*; because those out of the hundred were never discharged clearly, but in all points allowed for sufficient, and indifferent to pass, only for cause of the hundred. But the case had been more doubtful if ten or more had been returned *de circumstantibus*,

Where two hundredors only appear on the first panel, the *tales* for default of hundredors need only consist of two others, which shall be added to eight of the principal jurors not objected to.

Rast. Jurors, 17.
Noy. 12.
Dy. 65. b. 338. b.

1. Inst. 157. a.
10. Co. 101.
Dy. 245. a.
Bentl. 33.

where

where there were only two of the principal panel approved of. And yet in this case by a good precedent between *Agnes Rice* and *Lord Sturton* in a writ of *quibus* in the time of king *Edward 6.* a similar *poslea* was returned, and challenged for the causes above, and yet the trial was held good as above, and that they who were out of the hundred, after the supplement made of the hundredors *de circumstantibus*, shall be sworn as above, and not the new jurors.

[See the note to fol. 25.
a. pl. 156. ante.]

Earl of Arundel *against* Lord I. Gray.

The lessee of a messuage under the crown accepting by letters patent the office of the custody thereof, with a fee annexed, is a surrender of his lease.

3. Leon. 247.

31. H. 7. 6. a. 2. H. 4.

7. b. 5. Co. 11. b. Dy.

140 b. Br. Surrender,

14. 18. H. 8. 15. Roll.

Cont. 557. 2. Sid. 138.

[5 Com. Dig. 513, 514.

5. Bac. Ab. 463. 1.

Term Rep. 441.]

(62) ONE was possessed of the capital messuage of *Half-naked* in *Sussex* (which was the mansion house of the late *Lord La Warre*) for a term of years under a lease of king *Henry 8.* made in the augmentation court, rendering a rent; and afterwards within the term the same king granted the custody and the office of the custody of the same messuage by letters patent to the lessee for the term of his life, together with an annual fee for the exercise of the said office; and he accepted the grant, and is paid the fee. Whether this is a surrender of the term, or not, was a great question; and the matter amongst others was referred to the order and determination of certain of the privy council. And afterwards it was compounded by the arbitration of four, *viz.* of the two Chief Justices, Chief Baron of the exchequer, and *A. BROWNE, Justice, &c.*

In this case it was the opinion of *BROWNE, FLOWDEN, CARELL, and SAUNDERS*, that this was a surrender, although *DYER* and another doubted of it, but by award the earl had the house and enjoyed it. See the report in *SEY's* book, p. fol. 46 by *POPHAM* in the argument of one *Ayleworth's* case. *Eust. 37. Eliz. 3. Jac. Gibbs' and S arle's case* [Cro. Jac. 84. 176.] adjudged that the taking of the custody is a surrender.

Mich. 3. Jac. Cro. 84. Manor reserved no surrender, but exception was taken that there was no record in court, so that the Justices cannot give any judgment.

Bailiff is a collateral office, and not interest.

KENT.

* Chevin and Paramour's Case.

A fine was reversed in *B. R.* for nonass by inspection, afterwards on a writ of entry in *C. B.* an exemplification of witnesses in chancery was given in evidence proving full age. This

(63) ONE *John Chevin* being under age bargained and sold his land within the island of *Hartie* in *Kent* to one *Paramour*; and afterwards he levied a fine to the same *Paramour* for assurance: and immediately in the same Term, he brought a writ of error, and assigned the error in *B. R.* at the

the day of the return for his nonage, and prayed a *scire facias* against *Paramour*, and had it returnable *octab' Michael' prox'*, at which day the sheriff of *Kent* returned a *nihil habet nec est inventus in ballivâ*, upon which a *scut alias* was awarded returnable *crast' Animarum*, and a *nihil* was again returned, and the defendant did not come; upon which the Court proceeded to examination of the error, and as well by inspection of the plaintiff as by the testimony of four men worthy of credit, the Court adjudged that he was under age *at the time of the fine levied, and still is &c.* *Quære*, Whether this be not void, as the Court had not authority to judge of his age, unless he were within age *at the day of the writ of error purchased*, the error assigned. (64) And in the next Term afterwards the fine was reversed. And *Paramour* in the chancery sued one *Kine* and *Lowe* who had purchased the land of the infant in the mean time, and there they were at issue upon the age of *Chevyn*: and divers witnesses were produced there on the part of *Paramour*, who proved the plaintiff of full age at the time of the fine levied, and had them exemplified, and gave them in evidence in the bench in a writ of entry in the *quibus*, brought against him by the said *Lowe* and *Kine*, where the issue was on *non disseisvit*. And by the better opinion of the Court they are not of force or validity in law against the said judgment of the reversal of the fine, although *Paramour* appeared to the writ of error, because the majesty of that court, or the judgment there given by inspection, and testimony of the Court, cannot be disabled or controlled except by parliament. And the natural trial of this issue was by law by inspection, which see 25. *Lib. Ass.* 2. And the like *East.* 11. *H.* 6. [42. a. pl. 37.] in maintenance; and yet notwithstanding the opinion above, the verdict passed against it with the trial in chancery. And this verdict afterwards was affirmed in attain, upon which *Lowe* and *Kine* brought a writ of right, in which battle was joined, as appears in the 13th year of queen *Elizabeth* [post, fol. 301. a.].

the Court thought of no force against the judgment in *B. R.* but the jury found with the testimony in chancery, which was afterwards affirmed in attain.

Vaugh. 148.

Dy. 168. a. 2. 14. H. 7. 3. 19.

[Co. Lit. 380. b. Cm. Jac. 23. Com. Bac. & Vin. Tit. Trial by Inspection.]

50. E. 3. 5. & 6. 2. R. 3. 20. a. Perk. 4. 19. Lo. 5. E. 4. 50. b. F. N. B. 21 d. 8. E. 4. 13. 27. Aff. 53. 2. Kebl. 39. 7. El. 232. b. Dy. 370. a. Br. Fines levy 29. Fax Prohibition, 11.

11. H. 4. 15. Dy. 156. 9. Co. 30. b. 18. E. 4. 13. 21. 33. H. 6. 42. 9. a. 48. E. 3. 11. 17. E. 3. Fitz. Account, 221. F. 17. Aff. 231. R. 683. Dy. 212. a.

Trinity Term,

3. Queen Elizabeth.

Austen against Baker and Others.

Attaint will lie against the executors of the person who recovered by the false verdict, by the equity of 23. H. 8. c. 3.

In attaint, two of the petit jury challenged the array, which was tried against them; others challenging the polls must shew cause immediately.

[* 201. b.]

[Ben. in Keil. 210. a. An. Ben. 4. Benl. 87. 1. And. 24. Mo. 17. Dal. 36.]

6. Co. 80. a. Co. Lit. 294. b. 3. El. Bendl. 14. Dy. 250. Trin. 3. El. Rot. 821. Com. Banc. N. B. 86. 81. 8. E. 4. 16. 19. Dy. 211. b. Fitz. N. B. 107. k. 1. Inst. 294. Went. 45. Plow. 86. 2. Sid. 93. 11. 13. H. 7. 13. b. 20. 6. 9. Co. 44. 77. 13. 17. 18. E. 4. 5. 16. 9. 17. E. 4. 1. b. 35. H. 6. 30. a. 6. E. 6. 75. b. 2. Ro. Ab. 659. 1. Inst. 153. a.

3. 5. H. 6. 44. 19. 20. 43. Aff. 8. 15. 16. 20. 43. E. 3. Challenge 116. 93. 27. H. 8. 26. a. 7. H. 4. 41. 14. H. 7. 5. 13. E. 4. 2. Dy. 362. a.

(65) **A**TTAINT brought by *Austen* against *Baker* and Others as executors of the will of *Sir John Baker* knight, upon a false oath and judgment given in the exchequer in a *quo minus*, there brought by the said *Sir J. B.* as lessee for a term of years, and farmer to the queen, against the said *Austen*; and the writ supposed that the executors "*bold the land, &c.*" And now the grand jury appeared and the petit jury also, and also the executors. * And exception was moved by the defendants, that this attaint which was brought upon the statute of 23. H. 8. [c. 3.] is not maintainable against any other than him who recovers, (and this was *Sir J. B.*) for the words of the statute are accordingly; and attaints are penal, and shall be taken strictly. And yet by the opinion of the Court it was well enough against the executors, for this statute is made in favour of the subjects, namely, for the qualification of the rigorous and terrible judgment of the common law in attaint: and these words, *viz.* "*against the party that hath judgment to recover,*" are not of substance, but superfluous, because the action of attaint runs for the thing that was lost against him who has it in whosesoever hands it shall come &c. wherefore &c. (66) And the plaintiff assigned the false oath, and the petit jury pleaded the general issue, and the executors pleaded an accord between the plaintiff and the testator after judgment concerning all the right and interest in this land &c. made in *London* in the parish of *Saint Faith &c.* to which the plaintiff demurred; and pending this plea undiscussed, the jury was to be charged upon the other issue by the statute aforesaid (note this.) And two of the petit jury challenged the array, and by the triors the array was affirmed, and then the residue of the petit jury challenged the poll of the first juror, and did not shew cause immediately because they were not parties to the challenge of the array: and the Court held that they ought to shew cause imme-

Attaint does not lie upon suit by *Bill*. Trin. 5. E. 3. Rot. 90. *Ex Lib. Mr. Noy. Vide* 44. E. 3. 2. b. *per Knevet.* [And since the practice of setting aside verdicts and granting new trials, this writ of attaint hath become obsolete, 3. Bac. Com. 405. 1. Burr. 393.]
diately,

diately, as well as the two others, because they would have taken the advantage if the array had been quashed, and by the same reason the disadvantage if &c. And yet in trespass against two in *East*. 33. H. 6. fol. 21. which was cited by HARPER, *Serjeant*, it was done otherwise; which note well. And afterwards the matter was put in arbitration &c. And the plaintiff executed a release to the defendants, and also to the petit jury, which was pleaded *puis darrein continuance* in arrest of the attain, and was received, and the plaintiff acknowledged his writing and deed.

Dy. 193. pl. 29.
Difference.

Ellen Lanibe's Case.

(67) ONE Ellen Lambe brought an appeal of rape against

R. P. before the justices assigned to deliver the gaol of *Newgate* next before the day of the Nativity of Our Lord last past: to which he pleaded not guilty; and was found guilty, by a substantial jury of *London*; and now he remains in prison without judgment, but he is known to be a clerk, and also that he is a bigamist, and yet as the law is now, he may have his clergy, by all the justices. And now by command of our lady the queen, the justices * were examined before the keeper of the great seal upon certain exceptions and doubts moved to the court of the appeal, s. first in this, because it is, that the "defendant on such a day, in the year, parish, and ward, &c. feloniously ravished and deflowered her, and carnally knew her," without saying "*feloniously*."

(68) Also because it was not averred in fact, that the plaintiff did not assent to the rape before or after, in which case the suit by the statute of *West*. 2. c. 34. is given to the party, and otherwise it is given to the king by way of indictment only. Also because in the conclusion of the count, it is not alleged to be *contrary to the form of the statute &c.* Also whether he shall be delivered as a clerk convict to the ordinary? *Quare*, Whether he shall without purgation: and, Whether the queen may pardon the imprisonment and burning in the hand, or not? But no resolution was made of these questions, but P. found favour with the queen, whom he had served be-

APPEAL OF RAPE.

[Jenk. Cent. 5. c. 78.
S. C.]
5. Co. 50. Dy. 261.
Stamf. 134. b. 154. 11.
H. 4. 11. Cromptor, 80.
[2. Hawk. P. C. 478,
479]

[* 202. a.]

4. Co. 81. Poult. 167. a.
18. E. 4. 10. b.

Br. Charter de Pardon,
46. 14. El. 312. a. 2.
Inst. 181. Stamf. 23,
24. 82. 1. H. 6. 1.
[2. Hawk. P. C. 253.
258, 259.]
Jenk. Cent. 4. c. 59. 3.
Inst. 237. 9. E. 4. 26.
5. Co. 50. Stamf. 138.
15. H. 7. 9. a. 21. E. 4.
26. 73. 11. H. 4. 13. a.
2. R. 3. 8. 9. M. 7. 5.
9. El. 261. a. 15. El.
723. b. Stamf. 104. b.
De action sur le Stat. 27.

(67) By the statute of 1. E. 6. c. 12. [§. 15. In] bigamy it is "*toll*" [allowed]; but by 18. Eliz. c. 7. Clergy is taken away in rape, and therefore he would not have it at this day

Corone 247. Stamf. 81.
182. 3. Cro. 682.

[2. Hawk. P. C. 503:
to 513. 555, 556. Hob.
294. And see the case of
Rex v. T. Burrage, 3-
P. Wms. 439.]

fore she came to the crown; and afterwards being let out of prison, he quitted the kingdom. But for the purgation of a clerk convict in appeal see *Stamf.* fol. 139. which vouches 12. R. 2. [Fitz. Ab. Corone, pl. 109] that in appeal of robbery he shall not make it, because if he was admitted to it, plaintiff would recover his goods without cause. But *quare* in other appeals.

Mich. 19. E. 3. Rot. 41. in a plea of rape it is said, "her of her puceflage feloniously ravished and wholly deflowered." *Ex lib. Mr. Noy.* [See the very curious old form of the count in *Novæ Narrationes*, edit. 1561. fol. 71, 72.]

Clere, Administrator of Clere, against Bartue and Wife.

LONDON.

In account by one as administrator of C. plea that C. made a will, and executors, demurred to for not traversing the intestacy.

7. E. 6. 79. Co. 6. 53. b.
4. Co. 118.
[Co. Lit. 16. b. 1. Bl. Com. 401.]
Br. Nofme 69. 35 H. 6.
12. 14 H. 6. 2. b. 4.
10. E. 4. 25. b.
[West. 2. c. 11. 25. E. 3. c. 17.]

Dy. 47 112. b. 174. b.
10. 34 H. 6. 5. 14. a.
1. E. 4. 2. 10. H. 7. 16.

4. 7. 8. 9. H. 6. 26. 13.
2. & 3. 32. & 7. 7. E. 4.
12. b. 3. 4. H. 7. 14. 13. a.
15. H. 7. 16. 38. E. 3.
1. b. 15. E. 4. 28. a.
5. Co. 32. b. 5. 7. 7. H. 7.
13. 5. 14. Dy. 180.
Administer, 22.

(69) ACCOUNT was brought by *Edward Clere* as administrator of *Sir John Clere* knight, who died intestate &c. against *Richard Bartue* esq. and *Katharine* his wife, who was duchess of *Suffolk*; but she was not so named in the writ, nor was *Bartue* named of any place, as he ought in this case, because process of outlawry lies in it; but no exception was taken to this. And the writ was from the time that the said *Katharine* was receiver of the money of the said *J* without saying *dum sola fuit*, but these words were in the declaration. And he counted of the receipt of four hundred pounds by the proper hands of the said *Sir J.* at one time (note this). And defendants pleaded in bar of the action, namely, that the said *Sir J. C.* before the administration was committed (and shewed the year and day) at *London*, in such a parish and ward, made his will, and thereby ordained one *† Walter Herondon* his executor and died; after whose death the said *W. H.* executor proved the said testament before *William Cooke* doctor of laws, keeper or commissary of the prerogative court of *Canterbury*, and thereupon administered divers goods and chattels of the said *J.* without shewing where: and that afterwards the said executor made his will, and one *A.* his wife his executrix and died, and she proved the will, and also administered as well the goods of the first

(69) *East.* 36. *Elix.* Rot. 501. *† Felton* who had married the countess of *Northumberland* brought debt against *Barrowg*, and she was named countess in the writ, and it was not abated.

[† In the Edit. 1592. it is only *W.* but in that of 1621 and the subsequent, it is *Walter* at length.]

testator

testator as of the said second testator, and shewed where &c. *Pr.* 236.
and averred the life of the said wife executrix, and demanded
judgment *si alio*, without taking any traverse to the * dying
intestate &c. and upon this plaintiff demurred in law, *last*
East. Rot. 1085.

Clovill's Case.

(70) **FRANCIS** Clovill brought attaint in *C. B.* of a
false verdict given in *Norwich* upon the statute
23. *H. 8.* [c. 3.] against a citizen of *Norwich* upon a verdict
given in the court of the city there against him, in an action
upon the case, and cognizance of this plea was demanded by
reason of the charter of king *Edward 4.* of all pleas of at-
tainments, and the charter was confirmed by *Edw. 6.* And yet
the cognizance was denied, for this form of writ of attaint
founded on the said statute mult of necessity be brought in
one of the two benches, for the words of the statute are,
“*That all attaints hereafter to be taken, shall be taken in the*
“*king's bench, or in the common pleas, and in none other court.*”
Note this.

23. *H. 8. c. 3.* casts the
cognizance of the city
of *Norwich* in attaints
as being passed after
their charter, though
that was afterwards
confirmed generally by
Edw. 6.
Bendloe's Rep. cap. 144.
S. C. Benl. in *Keilw.*
210. b. *S. C. 8. 22. E. 4.*
8. 23. 14. H. 4. 20.
Mich. 8. E. 4. Rot. 541.
1. Inst. 294. b. 3. Inst.
214. 3. Bendlofe, pl. 16.
11. Ch. 64. Dy. 28. 81. b.
135. a. 236. Bro. Pa-
tents, 111.
[*Co. Lk. 294. b. 1. Bac.*
Ab. 56.]

Benloe reports that it was adjudged that the mayor of *Norwich* cannot have cognizance,
because this article in their charter was granted to them by king *Edw. 4.* and their charter
confirmed by general words only in the 3d year of *Edw. 6.* and there are not these words
non obstante aliquo statuto: and this attaint was brought on the new statute of 23. *H. 8.* which
is, *that no attaint shall be taken but in one bench or the other*; and there is no *proviso* for
Norwich. And also this statute was expired in the 6. of *Edw. 6.* and revived again by a
new law in the 7. of *Edw. 6.* and so this statute was after their confirmation: fol. 7. case 32.
[fol. 99. pl. 144.]

Grey against Williams.

(71) **DOWER** was brought by *Thomasine Grey* against
Williams, who vouched to warranty the heir of her
husband within the same county, who came and entered into
the warranty as one who had nothing by descent in fee simple
of the said husband, and to render dower: and the tenant
averred that he had assets by descent. *Quere*, Whether he
ought to say, “*in fee simple*,” and whether the demandant shall

Where in dower the
heir being vouched
pleads *rien per descent* in
fee, and the tenant avers
assets by descent, the
widow is entitled to
judgment immediately
against the heir, *si* *si non*,
against the tenant be-
fore the trial of the is-
sue. But whether the

(71) See the record of parliament 35. *E. 1.* Petition of *Ermina de Seaton* against *John*
Bard for dower, where the tenant vouched the heirs, who made default after default.
Judgment against the vouchee, and that the tenant should hold in peace.

tenant must not aver that the assets by descent are in fee, *quare*, for lands in tail shall not save those of the tenant.

Falch. 1. Eliz. Rot. 515.

M. 3. & 4. Eliz. Rot. 908.

Intr. 3. 4. El. Rot. 115.

Mo. 25.

R. Entr. 242.

[Benl. 117.]

Dal. 36.]

} S.C.

[Cro. Jac. 688.]

9. Co. 17. b. fee it.

27. H. 6. 7. 48. E. 3. 5.

Hut. 71, 72, 21. E. ..

431. a. 28. E. 3. Re-

covery in Value 28.

Voucher 29. 15. E. 3.

Judgment 135. 18. E. 3.

36. 38. 20. E. 3. Voucher,

218. 2. H. 4. 8. 18. 28.

29. E. 3. 55. 99. 49. 6.

E. 3. 11. 20. 16. E. 3.

Dower, 56. 11. 13. E. 3.

Judgment, 127. 165,

166. 14. E. 3. Judg-

ment, 159. 13. H. 4.

Judgment, 221. 236.

9. 22. E. 3. 21. 3. 3. 10.

41. 48. E. 3. 52. 60. 31.

5. b. 7. E. 3. 7. 2. 3. 34.

H. 6. 17. 1. 16. E. 3.

Dower, 60. 5. E. 1. 59.

2. H. 4. 8. 10. E. 3. 8. b.

& 59. 20. E. 3. Judgment,

175, 176. 170. 180. 1.

R. 3. 2. b. 7. E. 3. 40. 34.

H. 6. 1. 1. 5. 26. E. 3.

6. b. 51. 58. 2. E. 24. b. 3.

5. E. 3. 4. & 51. Voucher, 180. 182.

17. E. 3. 47. Voucher, 92. 17, 18. E. 3.

41. 36. 17. E. 3. 11. 7. E. 2. Dower, 148, 149. Voucher, 157.

7. E. 3. 48. b. 16. E. 3. Voucher, 85.

17. E. 3. 12. 22. 8. E. 3. 67. 322. 326. Winch. 81. 88.

* [203. a.]

have judgment conditionally immediately if she pray it, & against the vouchee if he have the value of the third part of the land in demand, and that the tenant shall hold in peace; and if not, then against the tenant of the third part demanded, and that the tenant shall have in value against the vouchee *cum acciderit*; or that the judgment shall be respited until the issue of the assets be tried, or not; was well debated this Term and last Term: and by the opinion of the Court, the demandant shall recover immediately according to the conditional judgment aforesaid. And see the *Judicial Register* for a writ of seisin in such case, fol. 15. and 20. and in other places. And some writs make mention of assets in fee simple, and some generally of lands which come to the vouchee by hereditary descent only, by which it should seem that land in tail descended to the vouchee shall save and recompense the land of the tenant who vouches. But BROWNE and WESTON, *Justices*, thought the contrary. And according to their opinion is *M. 8. E. 3.* [63. a. pl. 24.] a good case in dower, where the heir of the husband being under age, and in ward for body and land, was vouched in ward, and the guardian being summoned, came and pleaded that the heir had nothing in fee simple, only fee tail, and an issue was joined upon this * point, for the tenant did not dare demur to it. Note well *Mich. 8.* of the now queen [*post* 256. a. pl. 7.]

Sir Ed. Walgrave's Case.

Every priest or minister, whether with cure of souls or not, is equally within 1. R. c. 2. and *clerk* is sufficient addition for such priest or minister in an indictment on that statute.

Indictment reciting 1. El. c. 2. to be made at a parliament holden on the 23d of January, when it was adjourned to the 25th, is a fatal variance.

But an information in

(72) DOCTOR R. clerk, Sir E. W. knight, and F. his wife, and divers others, were lately indicted before the commissioners of oyer and terminer in *Essex* for the celebration of a private mass, contrary to the form of the statute in the first year of the now queen, cap. 3. [2.] And the indictment was as follows, *s. Essex, The jurors present for our lady the queen, that John R. late of London, clerk, on the 8th day of April in the 3d year Etc. at B. in the county of Essex, voluntarily said, used, and celebrated one private mass, against the form of a certain statute in a parliament begun and holden*

at Westminster on the 23d day of January in the first year of the reign of our said lady the now queen, and then and there prorogued until the 25th day of the same month, and then continued from the same 25th day of January to and until the 8th day of May then next following, made and provided, and against the peace of the queen, her crown, and dignity. And that E.W. of B. aforesaid, in the county aforesaid, knight, F. and others, on the said 8th day of April at B. aforesaid, at the time of the celebration of the mass aforesaid, were present hearing the aforesaid mass, and maintaining and comforting the said J. R. the mass aforesaid to say and celebrate, against the form of the statute aforesaid, and against the peace, &c. (73) And this indictment was holden insufficient by all the Judges of both Benches, because there is no such act of parliament as above; for the parliament was not begun nor holden before the 25th day of January; for on account of the absence of the queen through sickness, the parliament was prorogued by writ patent under the entire great seal, and signed with the hand of the queen, bearing date the 21st day of January, and thereby the appearance of the lords and commons discharged at the said 23d day, which was the day of summons. And so note that the printed book of this parliament is false in the title, which says that the parliament was begun at Westminster on the 23d day &c. and there prorogued until the 25th day &c. and then and there holden and continued until the dissolution thereof, being the 8th day of May then next ensuing.

Also it was much doubted whether every priest who is not a parson, vicar, or stipendiary chaplain, nor obliged or bounden by his cure to serve &c. is within the purview of the said statute, by reason of the first clause, which is, "that all and singular ministers in any cathedral or parish-church, or other place &c." which may be intended a minister local and hired. (74) But at length by the opinion of all, except one, it was holden that he shall be within the statute, and this by reason of this clause, "and that if any manner of parson, vicar, or other whatsoever minister &c." by which the meaning of the parliament appears that the superstitious service in the church should be abolished, and the true service

this case reciting the parliament "tenet" etud "West" anno primo reg. nae "mon," was holden good, though it referred to that indictment.

[Jenk. Cent. 5. c. 79. S. C.]
Hob. 97.
Roll. Contin. 263.
Hetley 119.
2. Keb. 820.

Plow. 400. a 79.
Mich. 4. Jac. Cro. 139.
1. Mar. 95. a. 6. E. 6. 74. b.
Co. Jur. Courts, 7.
[Covp. 474. Dougl. 94.
2. Term Rep. 655 2.
Hawk. P. C. 350, 351.]

* [203. b.]

11. H. 4. 40. Fox. 1068.

Crompton's J. P. 108. a.

(73) That is the beginning of parliament, as was agreed in Sir John Jackson's Case. John Holcraft's Case, that the writ of summons to parliament in the 21st of James was returnable the 17th of February, on which day the duke of Lennox died, wherefore it was adjourned until the 19th of February, on which 19th of February the parliament shall be said to commence. By Mr. GLANVIL, in his reading 15. Feb. 1629.

[2. Haw. P. C. 272.]

planted in lieu of it. And under this term "*minister*" every priest is included, and by this, that he is a priest, he is bound *ex jure divino* to celebrate the lord's supper, and the prayers of the said supper &c. And also it was holden by all, that this term "*clerk*" is sufficient to prove him a priest or minister. And so the matter of the indictment is good and sufficient as well against *R.* who said the mass, as against *W.* and the others, who heard and maintained the said mass. And afterwards in *B. R.* an information was put in against the said *W.* and his wife for our lady the queen by the Attorney-General, declaring the offence to be as above supposed, against the form and effect of a certain statute in a parliament holden at *Westminster* in the first year of the now queen, whereof they stand indicted before the commissioners, and shewed their names at the next general sessions of oyer and terminer in the county aforesaid &c. and made no special recital of the act as above in the indictment, nor more than above. And to this information they were put to answer, and confessed the matter, and had their several judgments, *s. That each of them shall forfeit one hundred marks to our lady the queen; and if they shall not pay it within &c. then they shall be imprisoned &c.* and this forfeiture was estreated into the exchequer; and within the six months after the conviction *Ed. W.* died; and whether the debt be gone and extinct by this, *quare. Vide postea*, fol. [231. b. pl. 4.]

Dy. 223. 36, H. 6. 24-
5 Co. 22. a.

[See Stat. 23. El. c. 1.
§. 4. 11. & 12. W. 3. c. 4.
18. G. 3 c. 60. & 31. Geo.
3. c. 33. 4. Bl. Com.
55, &c.]

Moyer, Executor of Gyfors, against Carvanell.

Where defendant is in execution at the suit of an executor, if the will be annulled in the spiritual court, Whether an *audita querela* will lie?

8. Co. 144. a. Dy. 339.
35: 6 Co. 23. 2. Mar.
112. b. 4. Mar. 147. b
4. H. 7. 15. 13. E. 3.
Barre, 253 48 E. 3. 1.
12. H. 4. 7. b. 22. li. 6.
56. a. 16. E. 3. Pro.
cess, 163.

* [204. a.]

Dy. 103. 107. 353. Bro.
Delegat., 133. W. 11. W.
24.

(75) NOTE, That in the 35th year of *H. 8.* in the exchequer chamber, a case was well debated by all the Judges of both Benches, which was this: One *Moyer*, who was executor of the will of *John Gyfors*, sued a writ of account against one *Carvanell*, as receiver of the monies of the said *J. Gyfors*; the defendant pleaded, *ne unques recevoir pur accompt render*; and this was found for the plaintiff, and judgment given that he shall account, And upon this a *capias ad computandum* was awarded, upon which defendant came in and accounted in custody, and was found in arrear, * and his body put into prison for the execution. And afterwards the said will was annulled by judgment in the spiritual court, because the said *J. G.* the testator was a natural idiot

ideot from his birth; and this spiritual record was certified in the chancery by writ, and thence sent into *B. R.* where the action of account was brought. And the said *Carvanell* sued an *audita querela* in the same court, comprehending this matter in his writ, and a *venire facias* against *Moyer*, who demurred in law upon the whole matter.

8. Co. 144. Dr. Dru-
rie's Case at the end,
that *audita querela* well
lies.

[1. Bac. Ab. 198.]

HERTF.

(76) **I**T was moved for a question between the warden of the *Fleet* and the constable of the castle of *Hertford*, which of them ought to have the custody of those who were committed to the *Fleet* in the chancery, star-chamber, the common pleas, and the exchequer, which are courts holden within the castle, where the constable has the keeping of a prison: but it was holden, that for all the said courts, it was clearly with the warden of the *Fleet*; but for the duchy court some doubted, because the castle and prison of *Hertford* is parcel of the duchy.

The Term being ad-
journd to Hertford, the
warden of the Fleet shall
still have custody of the
prisoners from *C. B.* star-
chamber, chancery, and
exchequer, and not the
constable of the castle.
But *qu.* of the duchy
court; for the castle and
prison of Hertford is
part of the duchy.

[Jenk. Cent. 5. c. 80.
S. C.]

Finch, fol. 76.

Michaelmas Term.

3. and 4. Queen Elizabeth.

KENT.

Darell against Wybarne.

In waste, where it is confessed, *as upon nihil dicit*, the writ to the sheriff is only to enquire of the damages; nor need it be that he go in *propria persona*, for that is only to enquire of the waste where there is default on the distresses.

2. Inst. 389, 390. W. 5. Dy. 214.

Cro. 126. pl. 89. 3. Cro. 204. 2. 7. 11. 12. H. 4. 3. b. 38. a. 6. & 82. 3. b. 40. E. 3. 20. a. 10. H. 7. 28. 34. H. 6. 5. & 44. b. 27. H. 8. 13. 16. E. 3. Return de Vic. 82.

34. H. 6. 7. Waste, 40. Co. Lit. pl. 675.

[Bul. Ni. Pri. 120. 3. Black. Com. 128. 5. Com. Dig. 370. 5. Bac. Ab. 478.]

(1) **WASTE** by Darell against Wybarne, a *nil dicit* was entered, and a writ of inquiry of damages, and not of the waste, was awarded. And the writ was, that the sheriff in his proper person should go to the places wasted, and there enquire of the damages &c. And it was holden *per Curiam*, that the writ was good; and there is no need to enquire of the waste, for that is not denied &c. But *quare*, Whether in this case the sheriff ought to be in his proper person, and at the place wasted *ex rigore juris*? And it should seem not; for this form is only in the writ of inquiry of waste, where the defendant makes default at the distress, as in the statute of *West. 2. c. 15. [14.]* See *Hil. 33. H. 6. Rot. 508.* where defendant demurred in law to the declaration, and adjudged for the plaintiff; and the plaintiff remitted the damages, *s. the triple value of the waste*; and had judgment for the place wasted, without any writ *de inquirend^o de vasso*.

Hil. 33. Eliz. Adjudged accordingly in *C. B.* that where the issue in waste is out of the point of the writ, as upon license, release, or confirmation, &c. the jury ought not to have the view of the place wasted, nor enquire of it, but of the damages; and if judgment be given upon *nihil dicit*, or *non sum informatus*, or upon demurrer, the waste shall not be enquired of, but the damages; and the sheriff is not bound to return that he went to the place wasted.

Trin. 19. Jac. between *Tipping* and *King*, [*Winch. 5. Hutt. 44.*] upon search of precedents, it was agreed accordingly in *C. B.* and so it was adjudged 34. *Eliz. C. B.*

Trin. 3. or 5. Jac. A precept issued to the sheriff to enquire of the damages in waste, and the sheriff did not return the names of the jurors, and yet good; and *Walter*, secondary, said, that it was not usual to name them in that court. *Walmesley* said, the reason was because they cannot have an attain.

East. 41. Eliz. C. B. entered *Mich. 40, 41. Eliz.* Waste by *Lettsford* against *Sanders*, [*Noy, 5.*] by *Anderson* and *Walmesley*, If in waste the issue be joined upon a collateral point, as whether he entered as executor or devisee, still the jurors ought to have a view to give the damages: so if the waste be confessed or found by verdict: *aliter* if it be adjudged upon demurrer; but *Glanvil contra*. By all, the view in waste shall be of each parcel, to assess the damages.

East. 25. El. C. B. & Haddock's Case, holden, that the sheriff shall not go to the place wasted in proper person. [See *Warneford v. Haddock*, in error, *Cro. Eliz. 290.*]

* Quarles, Executor of Tull, against Capell.

(2) ONE Quarles, executor of one Tull, brought an action of debt against E. Capell as brother and heir of Henry Capell, knight, and declared upon a bond made to the testator by the said Sir Henry, in which he bound himself and his heirs &c. Defendant demanded judgment of the writ, because the said Sir Henry by his will made Ann his wife his executrix, and died, after whose death she proved the will, and administered &c. And afterwards the said Ann died, after whose death the administration of the goods of the said testator not administered was committed to one G. Ireland, who took upon himself the administration, and that he has, and on the day of the writ purchased had, assets in his hands to the value of the debt aforesaid &c. And the opinion of the Court was, without argument, that this was no plea. Which see in the time of *Edw. 1.* in annuity brought against the heir; and in the 6th year of *H. 4.* [2. pl. 14.] and in the 10th year of *H. 7.* fol. 8. Wherefore afterwards the defendant *reliēd verifcatione cognovit actionem.*

That the obligor made executors and died, and that they have assets, is no plea by the heir to an action of debt on the bond of his ancestor.

[Benl. 96. S. C.]

1. And. 7. S. C.
20. H. 7. 5. 14. H. 8. 10.
7. E. 4. 12. 4. E. 4. 25. a.
22. H. 6. 4. a. 6. H. 4. 3. b.

3. H. 4. 31. 10. E. 2.
Dett. 175.

7. E. 4. 13. a. Plow.
193. 439. 27. E. 3. 52.
Dy. 208. pl. 15.

[See the marginal notes and references to Plow. 439. last edit.]

Benloe's Rep. [97. pl. 142.] That plaintiff had judgment to recover, because it is in the election of the plaintiff to sue the heir or executor.

(3) TRESPASS was brought upon the statute 5. R. 2. [ft. 1. c. 8.] supposing the entry into three acres of land. Defendant as to two acres conveyed to himself title by gift in tail, and gave colour to the plaintiff: and for the third acre, he entitled himself by an allotment upon a partition: and plaintiff entitled himself, and traversed the gift in tail for the two acres, and also traversed the allotment for the third; upon which they were at issue: and it was found by verdict given in open court, as to one of the two first acres for the defendant, *s. the gift in tail*; and as to the other for the plaintiff, *s. there was no gift*; and for the third acre, *s. for the issue upon the allotment, they were not agreed*; and no damages were assessed for the trespass in the second acre. And by leave of the Court they went back from the bar to enquire of the allotment. And about six o'clock in the afternoon they denied their verdict given in open court for defendant of their own accord, without being examined to it by

Trespass in three acres, the jury find in open court as to one acre for the plaintiff, for defendant as to a second, but not agreeing as to the third were sent back, and at night gave a privy verdict for the plaintiff as to all; yet in the morning they affirm it for the third only, without noticing the alteration of the first verdict; yet the plaintiff had judgment for all.

T. s. H. 3. Rot. 425.
1. Inf. 257. a. b. See the difference between actions of trespass by common law and statute.

Plowd. 211. 6. 3. H. 4.
12. a. Dier, 209. 255.
[5. Mod. 250. 151.]

37. Aff. 39.

the Judge, who was BUTLER, one of the Justices of C. B. and this was found for the plaintiff. And also for the second acre they found for the plaintiff as before they had done, and assessed damages for both: and for the third, s. the allotment, they found also for the plaintiff, and assessed damages for this also, and costs for all: and this last verdict for the allotment only they affirmed in the open court of the Bench on the morrow, with the damages, without * saying any thing of their alteration as above. And yet upon great deliberation judgment was given for the plaintiff. The like afterwards in this Term, fol. [209. a. pl. 21. post.]

* [205. a.]

[Co. Lit. 227. b. 3.
Black. Com. 377. 5. Bac.
Ab. 288.]

One standing mute or not answering directly on his arraignment for high treason, shall have judgment as if convicted.

Jenk. Cent. 5. c. 81. S. C.
West. 1. c. 12. 3. Inf.
217. 4. Co. 124. b. Br.
Paine, 19. Stamf. 150,
151. 3. El. 300. b. 10.
14, 15. E. 4. 19. b. 7. a.
33. Poulton de Pace,
212. 8. H. 4. 3. a. 11.
Co. 3. [2. St. Tr. 312.]

(4) NOTE, That it was said by SAUNDERS, *Chief Baron*, and WHYDDON, *Justice*, that the practice was, in the time of JOHN BALDWIN, *Chief Justice of C. B.* and also before in the time of EDWARD MONTAGUE, *Chief Justice of England*, that if a man was arraigned for treason and held himself mute, or would not directly answer to the crime, judgment should be given upon him as upon a traitor convict. Which note well.

(2) *Inst.* 301. Note the difference where one holds himself mute in treason and where in felony; for, for treason he shall be attainted when he refuses to answer, as much as if he had been convicted by verdict. [But now by 12. G. 3. c. 20. the same is the law in felony and piracy. And see *Bl. Com.* b. 4. c. 25.]

MUTE.

Justices of gaol delivery who have respited a prisoner, may in vacation after the adjournment of the sessions make order for further respite, by the custom of the realm.

Jenk. Cent. 5. c. 82. S. C.
1. Inst. 283.
Dy. 164. a. Dal. 17.
12. H. 4. 23. a. 1. Aff. S.

(5) IT was moved by the Justices of assize there, if a thief be condemned to be hanged, and yet the Justices command the sheriff to respite his execution for six weeks only; and after the sessions adjourn, s. in the vacation before the six weeks expire, the said Justices command the sheriff to respite the execution still longer; *quære*, Whether they can do this, because their commission of gaol delivery seems to be finished by the adjournment; and it is usual to have a new commission every time they come to the sessions of gaol delivery. And yet by the opinion of all the Justices the order of further respite is good enough; and the custom of

Justices of assize cannot allow clergy under the gallows, but only Justices of B. R.

the

the realm has always been so: and the case of allowance of clergy under the gallows proves this: also the statute *de Finibus* [c. 3.] at the end in the 27th year of *Edw. 1.* gives authority that the Justices of assize, if they are both laymen, without any commission of gaol delivery, may remain there in the country to deliver the gaol. And also the penning and letter of the statute of 1. *Ed. 6.* [c. 7.] of the demise of the king, which speaks of the alteration of the Justices, proves this, “as if the said Justices had continued.”

Stamf. f. 4a. c. 15. 34.
H. 6. 49. b. Crompt.
Courts, 126. a.

[2. Hawk. P. C. 39.]

Hal. Pl. Co. 240.

[2. H. H. P. C. 35. 2.
Hawk. P. C. 33.]

Justices of assize have their jurisdiction by patent.

(6) NOTE, By the opinion of all the Justices of assize assembled at *Serjeants Inn*, that if a man who may have his clergy granted in case of felony prays his book, and in fact cannot read, and it is so recorded by the ordinary and also by the Court, and this clause * “*non legit ut clericus*” is entered; and yet for some reason he is reprieved until the next sessions, and then he is again demanded, Whether he can read, and then he can read, he shall have his clergy notwithstanding the other record, *in favorem vitæ*; for he should have had it allowed under the gallows by 34. *H. 6.* [49. a. b. pl. 16.] if the Judge passed by there; and much more here. And although he have been taught and schooled in the gaol to know letters and read, that shall help him for his life: but the gaoler shall be punished for it; for that is a point inquirable *inter articulos placitorum coronæ*, 27. *Lib. Ass.* [138. b. pl. 44. art. 11.] so the entry of *non legit ut clericus* as above is of no force, but void. And it is not usual to make an entry of clergy, except where *legit ut clericus*, and then *ideo tradatur ordinario* shall be entered by the course of *B. R.* as the clerks there say: but before the Justices of gaol delivery the form of the entry is, *et tradito ei libro legit ut clericus, et traditur ordinario*, without *ideo tradatur*, &c. (a).

Though a *non legit ut clericus* be recorded of a convict, yet if after respice he be brought up again and then do read, he shall have his clergy, but the gaoler shall be punished for suffering him to be instructed.

* [205. b.]

Jenk. Cent. 5. c. 82. S.C.
Dy. 214. b. 215.

Clergy, Br. 1. 22. Ass.
15.

Stamf. p. 132. a.

27. Ass. 44.

(6) *M. 7. Ricb. 2. B. R. Rot. 3. J.* vicar of the church of the *Round Church* in the city of *Canterbury*, because he by the license of *John Darcie*, gaoler and door-keeper there, instructed *William Gore*, an approver, who at the time of his taking was ignorant of reading, is adjudged and arraigned for felony, but is acquitted by the jurors. *Ex Lib. Magistri Noy.*

(a) By 1. *Ed. 6. c. 12. §. 15.* in the case of peers of the realm the necessity of reading is taken away, and by 5. *Ann. c. 6.* so in the case of every common person. See 2.

Hawk. P. C. 503. 513. and the case of *Rex v. Burridge*, 3. P. Wms. 439. and 2. Hawk. P. C. 555. 556.

Gery against Smart.

If the conufor of a ftatute, having a rent-charge, before ext:nt purchafe parcel of the land, the rent is gone, and cannot be taken in execution. *Scus* if the rent had been in execution before he got the land.

Tenant by ftatute ftaple may avow for a rent-charge.

On the demife of the crown after inquisition taken on a writ of extent, but before it was returnable, the return and *liberate* being afterwards in the time of the fucceffor; Whether it is not returned without warrant.

[Mo. 32. & Dal. 34. S.C.]

Infra, 208. b. 7. Co. 38. b. 6. Co. 78. b.

[19. Vin. Ab. 555. 2. Bac. Ab. 339. 3. Com. Dig. 502. & 505.]

3. 16. H. 7. 12. b. 4. 2.

31. E. 3. Aff. 5. 11.

H. 7. 25. b. 7. 35. H. 6.

3. 56. a. 7. Co. 39. a.

[Vide *sup.* 165. a. in marg.]

20. E. 4. 13. b.

* [206. a.]

7. Co. 30. Dy. 290.

Lit. fol. 126. pl. 556.

[5. Vin. Ab. 488.]

20. H. 6. 7. b. 39. H. 6.

24. 14. E. 4. 4.

Dr. Sent. Marchant, 44.

(7) A COGNIZANCE was made by the bailiff of tenant by ftatute ftaple of a rent charge, and fhewed the commencement of the rent referved upon a feoffment in fee-farm made by the conufor by deed indented a long time before the recognizance made, and fhewed the certainty of the recognizance; and that at the time of the recognizance the conufor was feifed of the rent in fee. And further he fhewed that the conufor was feifed of the land whereout the rent iffued, in fee, without making any conveyance, how he came by it, or for what caufe; *ideo quare inde*; for this deftroys his title, fince by the unity of poffeffion of the rent and land after the recognizance made, the rent was fufpended or extinguifhed for ever; and then it follows that it cannot be extended afterwards in execution to the conufee, becaufe it cannot be feized and delivered by the fheriff when it has not any exiftence, &c. But perhaps if the execution of the rent charge was once had by the extent, then after this the intereft of the conufee cannot be gone or defeated by the releafe or purchafe of the land whereof &c. made by the conufor. *Quare* of this, becaufe BROWNE thought it might. (8) And befides it appeared that the writ of extent was returnable in the chancery in fifteen days of *Saint Martin* which was next after the death of *queen Mary*, and yet the writ was then returned by *Pigot* fheriff of the county of *Bedford* by inquisition take non the 12th day of *October* which was before the death of *queen Mary*, before *queen Mary* herfelf in the chancery then being, which cannot be true, becaufe fhe died * on the 17th of *November*. And befides the writ of *liberate* was made in *Hilary* Term next by the lady *Elizabeth* now queen: therefore *quare*, whether the extent was not returned without warrant, becaufe by the demife of the queen the warrant ceafed to make execution; and it is not remedied by the ftatute of the 1ft year of *E. 6.* [c. 7.] Alfo in the conclufion of the plea he does not fay “as in the land charged with the diftreff of the conufee:” and for all thefe caufes the plaintiff demurred. And it was moved, that the tenant by ftatute or *elegit* of rent cannot make avowry, becaufe it is not land. And the ftatutes of *Alton Burnal* and *de Mercatoribus* [11. & 13. E. 1.] fpeak only of land, and not of rent &c.

&c. but the statute of 27. E. 3. of *Staple*, c. 9. speaks of lands and tenements (*b*), goods and chattels, &c. and rent is a tenement. (9) And then it was moved, that the remedy for him is by affize only and not avowry; but it seems to the contrary. And see *H. 13. H. 4. in Fitz. tit. Avowrie, cap. 23.* (but it is not found in the printed Book of this year) Dy. 373. b. Mo. 32. that the tenant by statute was of a rent reserved upon a lease for life, and after execution the rent was in arrear, and he distrained, and made avowry upon the lessee, who was plaintiff as his tenant by the manner; and no exception was taken to this. And afterwards by the opinion of the Court, for the defaults above, and one other, namely, because the record was, *a. Cro. 13.* that the master in whose right the recognizance above was made alleged the said unity of possession of the land whereout the rent issued, for the record was in this form, *s. and the said Richard Smart* (which was the name of the master) *says,* and the name of the bailiff was *William Smart*, the plaintiff had judgment to recover damages and costs &c.

(*b*) The word *tenements* is in the act *de mercatoribus* 13. E. 1. ft. 3. c. 1.

Belly and Others against Algor.

(10) **NOTE**, That this Term an outlawry of one *William Algor* at the suit of *William Belly* and others was reversed on good consideration in the Bench without writ of error, because these words usually put in the writ of proclamation, *s. "made upon three several days whereof one proclamation &c."* were omitted by the negligence of the exigenter, who was *Scrogges* and his clerk, whereby the writ did not bear any sense according to the intent of the statute 6. H. 8. [c. 4.] and a precedent of reversal was shewn, namely, *H. 8. Rotulo*. [Benl. 14. pl. 15.] was seen, because the writ of proclamation did not make mention to what sheriff the defendant should render himself &c. See *Easf. 4. [Elix. fol. 213. b. pl. 44. post.]*

Outlawry reversed without writ of error, for the omission of *tribus separabilibus diebus* in the writ of proclamation.

N. Ben. 34. S. C. Benlofe, H. 3. Eliz. f. 88. c. 137. S. C. 26. H. 3. 4. 4. E. 4. 42. 11. H. 7. 4. b. Dy. 172. b. 218. 21. 11. 22. 39. H. 6. 15. b. 21. b. 7. a. 1. b. 192. 21. H. 7. 13. Dy. 47. b. 195. Gouldf. 111. Mich. 26. H. 8. Rot. 612. Salary. Benlofe, fol. 19. cap. 6.

[2. Hawk. Pl. C. 650, 651. 3. Bac. Ab. 767. See 4. Burr. 2563. 3. Term Rep. 499. 4. Term Rep. 521.]

* Darell *against* Wybarne.

A lease is made to commence at a future day, before which the reversion is several times granted over; afterwards the lessee entering commits waste; the last assignee may count *ex assignatione* of each to whom the land came after the lease made, although there was no tenure under them.

Plow. 193. 192.

Dy. 60. a.

Dy. 208.

42. 46. E. 3. 28. 17.

[Hutt. 110. F. N. B. 127. and note b. there.]

5. H. 7. 19. and 13. H. 7. 26. b.
Br. Waste, 470.

(11) AN abbot made a lease for a term of years to begin five years afterwards, and before the term commenced he granted the land by deed enrolled to king H. 8. by force whereof, and by the statute of 31. H. 8. [c. 13.] the king was seised in fee, and granted it over in fee by letters patent. And before the term commenced the patentee enfeoffed A. B. The term commenced, and the lessee entered and committed waste, *s.* in digging the earth and soil of a certain wood or coppice, and also in cutting down trees of the said wood or coppice: and A. B. brought waste, supposing by the writ the waste in the lands and woods which he holds for a term of years of the aforesaid A. B. *ex assignatione* of the patentee, of whom the said defendant held for the same term *ex assignatione* of the lord the king H. 8. of whom the said defendant held for the same term *ex assignatione* which the abbot made to the said king H. 8. Whether this form of writ *ex assignatione illis*, be good; because in fact there was no tenure by the lessee of the abbot, nor of the king, nor of his patentee, nor any reversion in any of them, because the alienations were made before the commencement of the term. And it was holden *per Curiam*, that the form is good enough, and no other or better is given for this case in the *Register*. And the case is in *Natura Brevium Fitz.* [fol. 127.] in *Waste*, that if the woman be dowable against the heir of her husband, who enfeoffs a stranger, who assigns dower to the wife and she commit waste, the feoffee shall have the writ of waste *ex assignatione hæredis*, where there was no tenure between the mother and him, nor any reversion in the heir. And 5. H. 5. [12. a. pl. 30.] the lessor ousted the termor, and enfeoffed a stranger, upon whom the termor re-entered, and committed waste, the writ shall be *ex assignatione*; wherefore &c. More of this case fol. [207. pl. 14.] following.

(12) **A**TTAINT was brought of a false verdict given in *Romney Marsh* before the bailiff and jurors there in the 3d and 4th years of the reign of *P. and M.* and the writ of *certiorari* directed to them to remove the record into chancery was "*the record of a certain inquisition taken &c. in our court &c.*;" and for this default the writ was challenged: and by the opinion of the Court the writ was bad, and the record is not by this yet removed, for the record which is now removed of the time of another king cannot be a record of the time of the present king. *Vide* 16. E. 2. [477.] and 1. E. 3. 43. *simile*,

A *certiorari* to remove an inquisition taken in the late king's reign, calling it "*a record of an inquisition taken &c. in curia regis*," is bad. [Dal. 33.]
Dy. 173. 1. E. 5. 2. B. N. C. 278. Mo. 30. 3. Cro. 215. 29. Aff. 32. 3. 37. H. 6. 2. b. 29. 2. R. 3. 2. b. 9. H. 6. 4. b. Error, 5. 4. E. 4. 43. or 73. or 13. Dy. 105. b. Coke, 7. 31. a. [4. Mod. 247. 2. H. H. P. C. 214. Bac. Ab. Error, D.]

(12) *Trin.* 2. *Jac. B. R. Rot.* 950. 4 *Coke v. Newton*. A judgment was given in the court of *Ipswich*, and error was brought on it, and the record was removed into bank, and the certificate was recorded, which follows in these words: Pleas in the court of our lady *Elix. late queen of England*, where *late* ought to have been omitted; for it is the record *de verbo in verbum*, and then in the time of queen *Elix.* the record could not be of the late queen, unless it supposes another queen, and so error; and the judgment was reversed. And often afterwards this judgment was affirmed for good law.

Trin. 1650. *B. R.* between 4 *Foster* and *Browne*. An indictment was quashed because it was said therein of the *late king*, when the king at the time of the indictment was living. *Trin.* 50. f. 4. b.

Babington against Sheldon.

(13) **A**N abbot within the year before the parliament of 31. H. 8. made a lease under the convent seal for * a term of years of a wood containing four hundred acres for a rent; which wood was seven leagues distant from the abbey, and was an usual and saleable wood every year by parcels by a common woodward. And of the money arising from it he rendered account at the audit: and no fuel was carried thence for the house of the abbey, for it was always sold, but was never in lease before for the space of twenty-four years, nor long before, but reserved and retained in the hands of the abbot &c. Whether this lease be within the purview of the statute [31. H. 8. c. 13.] to be made void by the clause [§. 5.] s. "*which have not been commonly used to be set and let to ferme before the said lease, BUT kept and reserved in the manurance, tillage, or occupation of the governor, for maintenance of hospitality and good house-keeping &c.*" was the question upon a demurrer to the evidence in assize by *Babington* against *Sheldon*, where the issue was joined in this form, s. that the wood was not commonly

* [207. a.]
Wood belonging to an abbacy annually sold in parcels, and the produce paid into the hands of the abbot, held to be for the purpose of hospitality within 31. H. 8. c. 13. §. 5. and a lease of it granted within a year before that statute therefore void.
A tennor cannot plead *assisa non*, but should justify under his lease, concluding that so he is in *seus tennor*, or plead no tenant of the freehold named in the assize, if the fact warrant it.
Jenk. Cent. 5. c. 83. 5. C.
5. El. Benkese, pl. 16.
10. El. 271. b. 6. E. 6. 77. b.

2. A.C. 18. 4. H. 6. 19.

Dy. 72. 248. 9. 30. A.C.
2. 43. Cro. 117. pl. 59.
103. pl. 6.

Apte, 77. b. nu. 40.

[See Co. Lit. 228. b.
and Booth Real Actions,
271, 272. 278.]

monly reserved in the manurance of the said abbot &c. for maintenance of hospitality and good housekeeping in manner and form as the plaintiff hath alleged; and of this he puts himself upon the assize, and the said plaintiff doth so likewise &c. And by the opinion of the greater part of all the Judges of assize of *England*, for that purpose assembled, this lease of the wood as above was within the purview and intent of the act, although immediately it was not spent in hospitality, for it might be reserved in store by the governor of the house for such purposes, although it was not employed in it in fact. But the opinion was that the issue was insufficient, and misjoined above. And also the lease for the term of years above with conveyance of the reversion to plaintiff in fee above was pleaded in bar with the conclusion of "judgment whether the assize &c." *Et non allocatur per omnes* without conclusion of *issint eins sans tort*, for he cannot (being only a termor) plead in bar of the assize, any more than a disseisor or bailiff &c. for his plea should be, no tenant of the freehold named in the assize, &c.

Darell against Wybarne.

In waste, plaintiff declared that an abbot was seised in right of his abbey of the place wasted and demised to defendant, and that H. 8. being seised on the dissolution of the monastery granted to plaintiff and his heirs "*tenementa sua per nomen manerii de C. cum pertinentiis*." This is sufficient, without averment that the land in lease is parcel of the manor. See *supra*.

* [207. b.]

Supra, 1. and 12. Vide 206. b.

(14.) NOTE, In the waste by *Darell against Wybarne*, exception was taken to the count, *s.* that the conveyance of king H. 8. to *Culpeper* was insufficient to carry the reversion of the lands wasted and in lease; because in the beginning of the declaration the plaintiff says, that the abbot of *B.* was seised in his demesne as of fee in right of his monastery &c. of and in one messuage, one garden, three hundred acres of land, and eight hundred acres of wood with the appurtenances in *Goudberst* [*Scutberst*]; and being so* seised he demised the same &c. to the aforesaid *Wybarne* for the term &c.; and that after the surrender of the monastery, and by the act of 31. H. 8. [c. 13.] the king was seised in fee, and being so seised, by his letters patent bearing date at *W.* on such a day and year, gave and granted to the aforesaid *T. Culpeper* by the name of *T. C. Esquire*, the tenements aforesaid with the appurtenances, to the said *Wybarne* as aforesaid demised, among other things *by the name of all his manor of C. with its rights members and all appurtenances* in the *Wilde* in his county of *Kent* to the late monastery of *B.*

in the said county of *Kent*, then dissolved, lately belonging and appertaining, and being parcel of the possessions thereof, and of all messuages, tofts, cottages, lands, tenements, meadows, pasture lands, and common of pasture, woods, &c. (general words) situated, lying, and being in *Chingley* and *Southerst* in the *Wilde* in the said county of *Kent*, to the said manor in anywise belonging or appertaining, or as member, part, or parcel of the said manor before then being held, known, accepted, or reputed, to have and to hold the tenements aforesaid with the appurtenances among other things to the aforesaid *T. C.* his heirs and assigns, for ever; and did not make any averment that these lands and tenements in lease were parcel of the said manor of *C.* in the *Wilde*, or accepted or reputed as parcel thereof, and also that *Southerst* is in the *Wilde*. And this exception was taken at the Bench by *A. BROWNE, Justice*, who thought that the *per nomen* does not maintain the grant of the land in lease, unless it be enforced and supplied by an averment that it is contained *sub nomine manerii &c.* which says nothing of *Southerst*, in which vill the land is supposed &c. But as I think this is not so, for *manerium est nomen collectivum et generale*: and by the common intendment, and for the most part, it comprehends and contains messuages, lands, gardens, and woods, and also it may extend into divers villis in the *Wilde*. Also the sentence, *and of all messuages, tofts, &c. in C. and S.* is a general and perfect sentence by itself, and conveys the land there, although it is not parcel of the manor. Note this, but it is not so after the "*and elsewhere &c.*" And afterwards, on the last day of *Hilary Term* next, judgment was given for the plaintiff, *A. BROWNE* opposing it, and immediately a writ of error was delivered.

Dy. 246.

6. Co. 39.

Flow. 191.

Dy. 178.

Flow. 162.

2. Co. 33, 34.

[Shep. Touch. 89.]

Nas, lib. 2. fol. 8. pl. 8.
a good case to that purpose.

Winch. 92.

Bricknold against Owen.

* [208. a.]

(15) **D**EBT and damages were recovered against one in *London*, and before execution defendant died: plaintiff sued out a *scire facias* into *London* against the heir by his name, and as tenant of the land and tenements which were defendant's on the day of rendering the judgment* aforesaid; and it was returned *nihil habet nec est inventus*: and upon a *testatum* that divers lands and tenements which

After judgment the defendant died; the plaintiff may sue out a *scire facias* against the heir and tenants of the land which was the defendant's at the time of the judgment, and *elegit* against them, without previous process against the executors.

were

2. H. 4. 14. a.
22. Aff. 32.
30. H. 6. 5.
8. H. 4. 17. Dy. 160.
b. Br. Scire Facias, 42.
Supra, 205. b.
Dy. 162. b. 225.

[1. Crompt. Prac. 352.]

5. H. 4. 31. a.
46. E. 3. 29. b. 2. R. 2.
Execut. 46. F. N. B.
267. 3. Co. 11. 17.
E. 3. Execution, 139.

7. R. 2. Execution,
19. 163.
45. E. 3. 23. a. 16.
H. 7. 6. b. Dy. 204. b.

[See the references to
Plow. 439. in notis.
Ambler, 17.]

were of the aforesaid defendant at the time of the judgment &c. were in four counties, the plaintiff had four several writs of *scire facias* against the tenants generally without naming any one; and two of those writs were returned served, s. that *H. Owen* was tenant of two several rent-charges &c. and that he was warned &c. and made default; and the other two were returned, *quod nulli sunt terrarum tenentes* &c.; and plaintiff had against him two special writs of *elegit*, containing the whole matter. *Quere*, if there ought not to issue first a *scire facias* against the executors of the debtor, and if *nihil* &c. then afterwards against the terre-tenants, as in *M. 7. H. 4. 22.* [31. a. pl. 10.] but in the *Judicial Register*, fo. 57. & 70. a. such a *scire facias* as above is expressed upon a recognizance, and it is all one law, as it seems. And note that the statute of *West. 2. cap. 18.* which gives the *elegit* is, that “*the sheriff shall deliver all the chattels of the debtor (saving only his oxen and beasts of his plough), and the one half of his lands, until the debt be levied by a reasonable price or extent.*” So that the executors for the goods (if any there be) are chargeable, as well as the heir for the land, as it seems. *Ideo quere inde* if this be at the election and liberty of the plaintiff &c.

Hil. 24. Eliz. Note per Manwood, Chief Baron, that the course of the exchequer is, that if a man be in debt to the king by record or otherwise, and dies, the heir shall not be charged if the executor have assets, nor the feoffee if either of them have, for he said that the executor and heir come to the land and goods *gratis*, and therefore in reason ought to be charged. [Ante, 67. b. in margin.]

Issue that executors had assets on the day of the writ, is well supported by evidence of assets paid into their hands in the prerogative court on that morning, though they prove immediate payment of it over to another creditor by order of the Court previous to the actual issuing of the writ.

28. H. 8. 32. a. fo. 279.
a. 48. E. 3. 21. b.
Dr. and St. 77. 5. Co.
82. b. 9. E. 4. 15.
Dy. 232.

(16) [IN debt against executors, the plaintiff at *nisi prius* in London this Term gave in evidence to prove assets in their hands on the day of the writ purchased, which was 13th June, anno &c. that on the same day a sum of money to the value of the debt and more was brought into the prerogative court of *Canterbury*, and there delivered to the executors as a debt due to the testator: and this could not be denied by the executors; but they shewed to the jury, that immediately in the said court they delivered and paid the said sum to another creditor of their testator by the order of the said Court: and yet this was not allowed for administration, but that this shall be holden assets for the plaintiff, although the writ was purchased on the same day after the payment of the money; and so these assets were proved

proved by a narrow pinch. But by special pleading defendant might perhaps have helped himself: Wherefore the jury found assets generally on the day of suing out the writ without giving any special verdict.

It seems that the assets should be specially found upon *riens per discent*. This point was *Hil. 7. Jac. B. R.* error by *Spurling v. Gawfel*.

Paine against Sydney.

In B. R.

(17) **J**OHAN DANYELL, seised in his demesne as of fee of certain houses and woods in *Appulton* in the county of *Norfolk*, leased them for a term of years to one *Thomas Goodwin*, who entered; and afterwards the lessor granted the reversion to *Thomas Hollis, Knight*; and the said *Thomas Hollis* granted it over to *John Paine* * in fee. And afterwards *Goodwin* granted his estate in the term to one *Tho. Sydney*, who committed waste, &c. and for this case the writ was drawn in this form: "*If John Paine, gentleman, shall have made &c. then summon &c. Thomas Sydney &c. of a plea wherefore seeing &c. the said Thomas in the houses and woods which he holds for a term of years (by the demise of Thomas Goodwin, to whom John Danyel demised them for the same term,) of the aforesaid John Paine, of the assignment of Thomas Hollis, Knight, of whom the said Thomas Goodwin held them for the said term of the assignment which the said John Danyel made thereof to the aforesaid Thomas Hollis, made waste &c.*" And this by the advice of the Chief Justices of both Benches, and of the Chief Baron of the exchequer.

Form of a writ in waste for the third assignee of the reversion against the assignee of the lessee for years.

* [208. b.]

Dy. 90. 2. 40. 206.

[F. N. B. 126, 127.]

41. E. 3. 28.

3. E. 3. 15.

Blunt against Lord Hastings.

LEICESTER.

(18) **A**ND now at this day came as well the aforesaid *William Blunt* as the aforesaid *Edward Hastings, Knight, Lord Hastings*, by their attornies aforesaid, and the recognitors of the assize aforesaid being exacted, likewise came: and upon this the said *Edward H. Knight, Lord H.* challenged the array of the panel of the assize aforesaid, because he says that he is, and on the day of suing out the original writ of the assize aforesaid, s. on the 3d day of *May*,

Where a peer is defendant the want of knights on the panel is good cause of challenge to the array.

2. Rol. Abr. 636, 7.

5. El. 328. a.
6. Co. 54. a.

Co. Lit. 156. a.
2. 7. H. 8. 22. b.
11. El. 265. b.

22. H. 8. 22.
Plow. 117.
Dy. 266. 246.
B. N. C. 221. 328. 465.

in the second year of the reign of our lady the now queen, and before, was one of the great men and peers of this realm, having place and voice in every parliament of the said realm : and that the principal panel of the said affize was arrayed and made by *T. Lucy, Esquire*, late sheriff of the aforesaid county of *Leicester* ; and that the panel of ten recognitors of that affize was here at this day newly appointed, arrayed, and made, by *W. Skevington, Esquire*, now sheriff of the county aforesaid, no knight being named and returned in the said panels, as there ought to have been according to the privilege and custom of this realm, in such case from time whereof memory is not [to the contrary] used and approved. And this he is ready to verify, wherefore he prays judgment, and that those panels may be done away and quashed &c. And to this the plaintiff demurred, and it was adjudged a good challenge (a), wherefore the array and panel were quashed, and a writ awarded to the coroners to make a new panel, and this in last Autumn. The like was adjudged in the Bench in affize between *Newdigate*, plaintiff, and the *Earl of Derby*, defendant, in the time of queen *Mary, s. M. 1. and 2. P. and M.* [fol. 107. b. *supra.*]

(a) But now by 24. G. 2. c. 18. §. 4.
" No challenge shall be taken to any panel
" of jurors for want of a knight's being re-
" turned on such panel, nor any array quash-

" ed by reason of any such challenge, any
" law, usage, or custom, to the contrary
" notwithstanding."

COUNTY OF YORK.

Rayfing's Case.

An office returned " *ta-*
" *ken at B. of lands in*
" *H.*" without shewing
in what county, is insuf-
ficient.

(19) **A**N inquisition indented taken at *Beverly* on the 26th day of *September* in the second year &c. which says &c. that *Roger Rayfing* was seised of one capital messuage

In *Sherman's* case in the Court of Wards, 2. El. [Dal. 101. pl. 37.] it was found by office that such a one was seised of certain land, and in the 14th year of *H. 8.* made a feoffment to the use of himself and his heirs, and afterwards, in the 20th *H. 8.* he made his will and devised &c. And because it was not expressly found that he continued seised of the use at the time of his death, upon much consideration it was resolved that this office was uncertain, and a *melius inquirendum* issued, and it cannot be aided by intendment not traversable, for implication or intendment are not traversable, and an office ought always to be certain in a point traversable. And *PERIAM, J.* who was of counsel in the case, cited it in the argument of *Knights's* case, 5. Co. [54. Mo. 199. 210.] 11. *H. 8.* [Keilw. 200. a. pl. 11.] where an office finding one to be tenant by the curtesy, not finding what estate the wife had, and that there the tenant by the curtesy is dead, the heir of the wife under age, and that the land is holden of the king, this office is good for the king, which is not law, as it seems to me. See cases concerning the validity of offices, *Plowd.* 264. 485. 10. *H. 7.* 10. 13. *H. 7.* 8. *Dyer*, 161.

messuage in *Huggate*, and of four houses in the tenure of *E. F.* without mentioning in what county *Beverly* is where the inquisition was taken, and without shewing in what county *H.* where the tenements lie, is, and without shewing in what vill and county * the four last houses lie. *Quere* whether the office be void or not; and whether a new writ of *diem clausit extremum* shall issue, or the writ of *mandamus*. And *per opinionem* it was holden that the office above was insufficient, for if it were to be traversed, one could not know from what visne the jury should come. And such a case and precedent in an *inquisitio post mortem Solimon* in *Devon.* in the first and second year of *P. and M.* was ruled so in the Court of Wards upon great consideration, as is asserted by *Master Kayleway*. See * *M.* 16. fo. an office ruled insufficient because it contained only an implication or intendment of a dying seised in use or possession, and not expressly found so.

Trin. 8. Jac. accord'.
Ben. 111. 23. H. 7.
Cro. 99, 200.

Dy. 183.
4. 11. 7. 16.
Gould. 20.

Dy. 296. b.
3. H. 6. 5.
Br. Office, 1.
14. H. 7. 23.
[Lane, 39. Salk. 469.
3. Mod. 335. 3. Lev.
388.]

An office was found that such a one held of the king, and died seised, and that his heir is under age, and it was not expressed of what estate he died seised, and yet good by *Coke*, *Chanc.* 3. H. 6. 5. But *MARTEN*, This seems to be the better law; and so *RHODES* and *PERIAM* held in the argument of *Knigh's* case. 5. Co. not'. Plow. 485.

Coveney's Case.

(20) *MEMORANDUM*, That this Term one *Coveney* president of *Magdalene College* in *Oxford* made an appeal to the queen in her chancery from the sentence of deprivation by the bishop of *Winton* founder of the said college, the visitation of which (for the good government of the house, and according to the statutes and constitutions there) belongs to the bishops of *Winton*, and exempt from every ordinary &c. And the discussion of this appeal was committed to *BROWNE Justice*, and *WESTON Justice*, who after divers conferences with the civilians, resolved that the appeal does not lie, and that he has no remedy as the laws are at this day, because this case is out of the statute of 24. H. 8. [c. 12.] and does not observe the order of the statute &c. for this matter of deprivation is merely temporal, and as by a lay patron.

An appeal does not lie for the president of *Magdalene College Oxford* from sentence of deprivation by the visitor.

Dy. 273. Mod. 82, 83.
7. Co. 43. b. 2. Keb. 36a.
1. Rol. Ab. 712. Styl.
457. 2. R. 2. Quare
Impedit, 146. Dy. 243.
243. Br. Deposition 10.
11. Co. 99. b. 1. Rol.
Abr. 11. 14.
[1. Black. Rep. 82. 2.
Term Rep. 338. note (a).
3. Bac. Ab. 533. 5. Com.
608.]

And from this it follows that if he be so expelled, he may have an *assize* or such suit at the common law; wherefore &c.

He may have an *assize* at common law.
[1. Lord Raym. 9. 2.
Term Rep. B. R. 355.
contin.]

Saunders against Freeman.

Where a jury give a private verdict at night, and on the morrow give an open verdict in court contrary to their privy verdict, the open verdict shall be good, and the first void.

Mo. 23.

} s. c.

Plow. 210. b.

Supra, 214. b. 204. 9.

[5. Mod. 350, 351. Co.

Lit. 227. b. 3. Bl. Com.

377. 5. Bac. Ab. 288.

282.]

16. Aff. 15. 3. H. 4. 18.

Perk. 729. a. H. 7. 11. b.

Plow. 26. a.

[Lease for years conditioned that if the lessor grant the reversion the lessee shall have the fee, in *quid juris clamat* by the conusee of a fine levied by the lessor, if the termor claim the fee it is a forfeiture. In *quid juris clamat*, if the termor claim a fee, the conusee shall have judgment to sue for the seisin, and have the fine engrossed if he pleases.]

* [209. b.]

19. H. 6. 62. a. 1. 2. Co.

62. 55. b. & 68. 8. E. 4.

19. 1. H. 7. 22. Perk.

729. 15. E. 3. Judgment

237. Plow. 487.

13. H. 7. 23. 1. Co. 84.

1. Inst. 251. b. Plow.

212. a. 10. E. 3. 32.

Enquest 47.

(21) **I**N *quid juris clamat* by Saunders against Freeman the jury found, and gave a private verdict at the last *nisi prius* at night for the defendant, and the next day in open court they altered their verdict, and found for the plaintiff. And both verdicts were returned on the *postea* by the advice of all the Justices of assize in England: upon which of the two verdicts the judgment shall be given, was the question. And by the opinion of all the Justices, s. WESTON, BROWNE, and DYER, the last verdict shall stand, and be in force, and not the first. But what manner of judgment shall be given in this case, *Cur' adv' vult*.

Plesington's Case in 6. Ric. 2. [Fitz. Ab. Tit. *quid juris clamat*, pl. 20. and Condition 19. cited also 2. Brownl. 227.] was, that a man made a lease by indenture for a term of years, and further granted that if the lessor aliene the reversion or die within the term, that then the lessee should have the freehold; and livery of seisin was made accordingly. And afterwards the lessor by fine granted the reversion in fee as a reversion dependant on a term of years. And the conusee brought a *quid juris clamat* against the lessee, supposing him to be a termor only, and he claimed the freehold: and for this cause judgment * was given that the term by this claim shall be forfeited, and that the conusee may enter, and that the fine shall be ingrossed if he choose &c. for the condition above was holden repugnant. And at length judgment was given in the first case, not that the plaintiff should recover seisin, but that he might sue for the seisin if he would, and that also the fine should be ingrossed, if he would, according to 7. 10. E. 3. 7. & 4 E. 8. of the now queen, in the exchequer, upon intrusion in *Suffolk* against *Smith*, two verdicts were given as above; and the last was for the queen, and that stood.

Lessee for years in *quid juris clamat* upon a grant of the reversion claimed the land for life, this is a forfeiture of his term of years.

Leases made by the king of lands of the duchy of Lancaster are not voidable for the nonage of

(22) **T**RESPASS *de clauso fracto* &c. at *Bradley* against five. And the trespass was in a certain large waste called *Bradley-bey*, in which each defendant severally

rally

rally claimed common appendant to the manor of *Braylesford* in the same county, whereof they are several tenants, which manor was holden of king *H. 5.* as of his Duchy of *Lancaster* by knight-service; and that it was in ward of the king by the nonage of *Ralfe Shyrley*, the wardship whereof was granted by the said king *Henry 5.* to one of the defendants under the seal of his Duchy of *Lancaster*, rendering to him and his heirs of the Duchy aforesaid forty marks by the year *durante minori etate*: and prayed aid of king *H. 6.* and had it by the common words, *s. sequatur penes dominum regem*. And afterwards a *procedendo* came out of the chancery in the name of the King, and not as Duke of *Lancaster*, directed to the Justices of the Bench to proceed in the plaint, *sed non ad iudicium rege inconsulto*. And this precedent was inspected, and shewn in the great case of the Duchy of *Lancaster* which is yet in question, namely, Whether by the nonage of king *E. 6.* the leases by him made of the lands of the Duchy are voidable (which case appears especially in a book in which all the statutes made in the times of *Hen. 4. H. 5. E. 4. and H. 7.* touching the Duchy, and the severance of the possessions of it from the Crown, and the sale and ordering of the lands of it are recited,) and delivered to each Justice. And by the opinions of all the JUSTICES of both benches, of SERJEANTS CARUB, PENTRELL, and of the ATTORNIES GENERAL and OF THE DUCHY, and FLOWDEN, being assembled at *Serjeant's Inn, Fleet-street*, after the end of this Term by command of our lady the Queen, it was resolved, that the leases are good and effectual, and not voidable for the nonage of the King, because they pass from his person as King, and not as Duke, for in the title of King the title of Duke is merged: and it is impossible that one person can be Sovereign and Subject. And the statutes above do not touch the person of the King in any part, *s. that he shall remain as Duke*, but only that the possessions shall be entire and separate &c. And so the resolution was made as before in the 1st year of the now queen in *Trin. Term*, fol. [168. pl. 18. ante.]

the king, inasmuch as they pass from his person as king, and not as duke, for in the title of king the name of duke is merged.

See the record of this case 3. H. 6. Rot. 112.

Flow. 212. b. S. C.

[Jenk. Cent. 5. c. 84.

S. C. Raft. Ent. 27, 28.]

Dy 164. 26. Aff. 54.

6. E. 3. 291. Droft. 24.

Flow. 221. c. 1. E. 6.

B. N. C. 373.

Dy. 94. b.

Flow. 216, 217.

Debt against two executors, one confesses, the other makes default, judgment is *de bonis testatoris* against both. And if on a *fi. fa.* upon this a *devastavit* be returned against the defaulter, the *scire facias* and execution *de bonis p. opriis* is against him alone.

Dy. 239. a. Yelv. 219. 8. E. 4. 24. 11. 28. 31. H. 6. 16. 3. 13. 14. H. 4. 12.

[Cro. Eliz. 519. but see 1. Str. 20.]

[1. Wils. 258. 1. Com. Dig. 255. 256. and see 3. Term Rep. 685.]

2. 9, 10, 11. H. 6. 12. b. 9. b. 5. b. 8. a. & 37. 9. 11. H. 6. 57. 7. & 1. b. Dy. 185. 40. E. 3. 2. b. 12. H. 7. Keilway, 23. Went. 232. 244.

(23)* *MEM.* That in *Michaelmas Term*, 3. *H. 8. Rot.* 639. it appears that the prior of *M.* brought a writ of debt against the bishop of *Litchfield* and *Coventry*, executor of the will of *T. R.* late archbishop of *York*, that he together with *Henry Crambull* late of *R.* in the county aforesaid clerk, executor of the aforesaid [arch-] bishop in the will aforesaid, render to him £.199. 6s. 8d. which they unjustly detain from him &c. And he counted upon a demise of the tythes of *Tychil* by indenture between the prior and archbishop. And that after the death of the testator he requested both of the executors &c. And the bishop came at the first day by summons and confessed the action, therefore it was agreed that the plaintiff should recover the debt aforesaid together with the damages taxed by the Court to be levied of the goods and chattels as well those in the hands of the aforesaid bishop as in the hands of the aforesaid *Hen. C. &c.* And nothing said of the amerciamment of the bishop because &c. as above. And afterwards s. in 4. *H. 8. Rot.* 303. it appears that a writ of *scire facias* issued in the said *Michaelmas Term*, returnable on the morrow of the purification, of the goods and chattels of the testator in the hands of the said executors to render to the said plaintiff for the debt and damages aforesaid, whereof the said bishop was convicted, and the sheriff had returned, that the said executors then had no goods or chattels &c; but that the aforesaid *Henry C.* had divers goods and chattels to the value of the debt and damages aforesaid which were of the said testator &c. and he had wasted them before the receipt of that writ, and converted them to his own use, as appeared to him; and upon this return a *scire facias* issued returnable in fifteen days of

M. 38. 39. *El. C. B. & Faughan v. Thompson* and his wife who was executrix of her first husband, and upon a *devastavit* returned, a *capias qd satisfaciendum* issued against both *de bonis propriis*: the husband was in the *Fleet*, and the wife was brought into court by *babere corpus*, and it was prayed that she might be committed to the *Fleet* also. *ANDERSON* moved that she should not, for if she and her second husband had been joint executors, or if she had not proved the will or administered during her widowhood, she should not be charged in *devastavit*, for then it was the act of the husband: yet she was committed to the *Fleet*, for it appears that she was executrix, and that she administered when she was sole, and then the devastation of the husband shall be said the act of the wife. [1. Vez. 386. 3. Br. Caf. in Chan. 327. 1. Com. Dig. 249.]

⚡ *M. Ford's Case*, That the judgment shall be general against all the executors, for the principal, *de bonis testatoris, et si non, de bonis* of him only against whom the *devastavit* is returned; and see there how the return ought to be made.

Easter against the said *H. C.* only, to have execution *de bonis propriis*, and upon the return of *scire feci*, execution by default was adjudged against the said *H.* only, of his own proper goods and chattels &c. *Nota bene totum.*

Mo. 299. 1. Cro. 519.
3. Cro. 318.

[5. Com. Dig. 209, 210.
2. Br. Caf. in Ch. 114.]

Hilary Term,

4. Queen Elizabeth.

Stile against Tomfon.

(24) **A** MAN seised of lands in fee-simple made his executors *A.* and *B.* and by his last will in writing after 32. *H.* 8. willed that his executors should have and hold the issues and profits of two parts of his lands until his heir by the common law should come to the age of twenty-one years, to the intent that his said executors with the profits of it should pay his debts, perform his legacies, and for the education of his children. One of the executors died; the survivor made his executors and died also, the heir being yet within age. *Quære*, Whether the executor of the survivor may meddle with the profits of the lands and with the disposition thereof during the nonage or * not? And CATLYN, Chief Justice, SAUNDERS, Chief Baron, A. BROWNE, and MYSELF, thought that he well may, for this was an interest in the executors by the devise, and not an authority or trust only. *Simile*, *ante*, fol. [177. a. pl. 32.]

Devise that the executors shall take the profits of lands to pay debts &c. till the full age of the heir; both die during the minority; the executor of the surviving executor shall take.

[Vin Ab. Devise N.B.]
1. Inf. 112. b. 113. a.
[See] Dy. 177. a. 219. a.
371. b. [and 191. a. pl. 19. and the marg. references to those fol.]

* [210. b.]

19. H. 8. 9. a.
3. Cro. 252. 49. E. 3. 16.
Fulb. 17. a. Br. Execut.
3. Wentw. 369. All.
45. Gould. 2.

The Queen against Grassey and Others.

(25) **M**EMORANDUM, That three Justices of the peace of the county of *Stafford*, s. GRASSELEY, WORLEY, and ROBINSON, were accused by information for our lady the queen, by her attorney, because they did not make

In the STAR-CHAMBER.

Justices shall not be fined under 13. H. 4. c. 7. without having had notice of the riot.

Fulb. Paral. 24. lib. 1.

7. E. 4. 18. a. Stamf.
fol. 33. 22 E. 3. Co-
rone, 238. 1. Cro. 752.
7. Co. 6. b.
Crompt. 46. 54.

inquiry of a notorious riot committed near *Litchfield* by three hundred men in burning fences &c. inasmuch as they were the nearest to the place where &c. within one month after the riot made. And because there is no word in the statute, that any complaint, information, or notice is necessary to be made, it was moved by several that they are bound by law to take notice at their peril upon pain of forfeiture of one hundred pounds. Yet divers of the Judges were of a contrary opinion. Therefore *quære* well the words of the statute, which is 13. H. 4. c. 7. and the law. And it was likened to an escape of a murderer, the township shall be amerced for the escape if it was in the day-time, although the murder was committed in the fields of the city, or a lane &c. But it seems reasonable that notice or complaint should be made to the Justices, for so is the statute of [15.] R. 2. [c. 2.] of forcible entries, of which mention is made in the said statute of 13. H. 4. Also the Judges of assize are in the like penalty if such a riot &c. be committed in their presence sitting in their sessions; therefore not without complaint or notice given if they are absent.

[1. Hawk. P. C. 307.]

Lord Sands *against* Sir Ed. Bray.

On *estrepement* granted pending a *scire facias* to have execution of a fine, a purchaser prior to the *scire facias* is prohibited by the sheriff from cutting wood. *Quære* what remedy?

[1. Inst. 328, 329.]
Pitz. N.B. 61. F. i. Mo.
35. 33. E. 3. Ayde del
Roy 109. 14. H. 7. 7. b.
2. H. 6. 13. a. Estrepe-
ment, 6. 8. 9.
33. H. 6. 6. a. 23. E. 3. 2.
Dy. 184. b. 3. Co. 23.
18. E. 4. 6. 7. Co. 29

(26) **A** *SCIRE facias* upon a fine was brought by Lord Sands against Sir Edward Bray knight, and a writ of *estrepement* was prayed and granted against the tenant and another directed to the sheriff, to prohibit &c. And both writs issuing out of the Bench where &c. And the tenant had made sale of a wood, parcel of the land of which execution was demanded, to Sir Jo. Gascoigne, a long time before the writ of *scire facias* purchased. And now complaint was made by him that he was disturbed by the sheriff from cutting the wood: *Quære* what remedy?

(27) **I**T was moved for a question, Whether a man in a plea of land shall have the view after a general imparlance, or not: and by the opinion of the Court he shall not have it, for he takes notice of the land upon himself: and therefore he shall not plead non-tenure or joint-tenancy after the imparlance. But *Leonard*, prothonotary, and other clerks, held the contrary of the view above by divers precedents.

184. 187. 1. Com. Dig. 71. 4. Bac. Ab. 28. 1. Term Rep. 278. 4. Term Rep. 224. 2. Black. Rep. 1094.]

(27) Agreed by the Justices, that non-tenure may be pleaded after imparlance in dower; and by *Anderson*, that he had a note, that general imparlance may make a bad writ good; but an especial imparlance not.

Hil. 22. Jac. Rot. 210. B. R. Marshall and Allen's Case [Palm. 496. Latch. 83.], in an *ejectione firmæ* defendant imparled, and afterwards pleaded that the land is ancient demesne, s. intending that the Court would not &c. *Sir Tho. Crew* took exception, that this is not pleadable after imparlance, because it goes to the writ and not in bar; and to this purpose he cited *Trin. 4. Jac. Clerke and Hampton's Case* [*ibid.*], where the plea of ancient demesne was disallowed after imparlance. The Court was against him, and agreed to this difference between the writ and bar in all cases except ancient demesne, because if judgment be given here, the lord would reverse it by disceit. See *East. & B. R. fol. 47.* [Cro. Car. 9. post. 373. pl. 13.]

Sir Robert Chester's Case.

(28) **K**ING H. 8. by letters patent made on the first of *January* in the 38th year of his reign, made a dissolution of the courts of augmentations and general surveyors, * and made of them one court, called the Court of Augmentations and Revenues of the Crown. And he erected eleven offices of receiverships in the kingdom, and made ordinance in these letters patent, that the said receivers should enter in their accounts, and finish them before the end of *Hilary Term* annually, and pay the last money of their debt determined by the auditor before the 20th day of *March* then next following upon pain of forfeiture and loss of their offices and of such bonds as they should be bound in for them. And afterwards king *Ed. 6.* in his first year, by his letters patent granted to *Sir Robert Chester*, knight, the office of receiver of *Effex, Herts, and London*, for the term of his life, with fees, &c. And afterwards, s. in the 4th year of *Ed. 6.* the patentee was cast in arrearages in his account made before an auditor of the said court, and did not pay the debt before the said 20th day according to the ordinance above. And these arrearages appeared by the record in the exchequer.

A view cannot be had, or nontenure, or jointenancy pleaded after a special imparlance.

46. E. 3. 4. 4. H. 7. 10. 9. E. 4. 31. b. 36. a. 3. 9. E. 4. 27. 26. 14. 32. H. 6. 5. 3. 18. 46. E. 3. 20. 4. Mo. 32. Hutt 28. 20. H. 7. 14. a. 35. H. 6. 31. 21. H. 7. Cro. 93. [Gilb. Hist. C. P. 183.]

2. Black. Rep. 1094.]

* [211. a.]

The patent appointing a receiver of the court of augmentations with condition, may be repealed without an office found of the breach of the condition; but it is not therefore merely void, there must be a *scire facias* to repeal it. It is not forfeited for non-attendance on any sovereign when distressed by rebels under 11. H. 7. c. 18. except that by whom the appointment was made.

[See the cases ante 197. b. & 198. a. b.]

And afterwards, s. in the 7th year of *E. 6.* the said letters patent of dissolution and erection (because it was doubtful whether they were sufficient in law, for that it was not done by authority of parliament as the first erections were) were ratified and confirmed by act of parliament in chapter 2. with *proviso* that the said letters patent should not extend to charge any person with any penalty or forfeiture concerning the levying of the revenues of the king, &c. otherwise than by the law of the realm before the said act they were chargeable &c. Whether by this non-payment the office was forfeited, and lost without office found of it, or not, was demurred in law in the chancery.

Flow. 399.

Br. Office devant. 30.
Ante, 151. b.

[3. Lev. 223.]

[The property of out-laws vests in the crown without office. 5. Term Rep. 113, 114.]

3. Rol. Ab. 184. 191, 192.

9. Co. 96.
Ante, 198. a.

[3. Bac. 743. * 4. Com. Dig. 397, 358.]

6. 11. Co. 27. 12.

* [211. b.]

(29) Also because in the first year of *Mary* the patentee was not present in the service of the said queen when she was distressed at *Framlingham* by her rebels, according to stat. 11. *H. 7. c. 18.* Whether by this the office was forfeited and void without office found of the absence, or without *scire facias*? And as it seems the office was forfeited by non-feasance of payment as above according to the ordinance, notwithstanding the *proviso* above. For this case is out of the intent of the proviso; but yet without a *scire facias* to be brought by the king, if no new patent had been made *Sir Rob. C.* ought not to have been removed, because he was an officer of record, and by record he ought to have been displaced. And so see *obiter* in the case of the Marshal 39. *H. 6.* [32. b. pl. 45.] and also in the time of *H. 8. s. Mich. 14.* in chancery the patent of one *Toly*, auditor, was repealed at the suit of the king for breach of a condition in his office: see the case *antea*, fol. 197. among the notes of *scire facias*. And this sort of suit to repeal letters patent has been always used without any inquisition or office first found. (30) And as to the forfeiture of the office by the statute of 11. *H. 7.* it seems no forfeiture, and yet the statute in part is perpetual, and is not determined nor expired with the death of *H. 7.* although *Rassal* thought otherwise in his collection of statutes, tit. * *Warr. 8.* But the service of attendance shall be done only to that king by whom the patentee is advanced &c. and to none other &c. And there also he shall not be removed without a *scire facias*; for these words in the act, "and that duly proved," go as well to the absence without license as to the excuse for sickness or other impediment unfeigned &c. And this is collected from the whole sentence &c.

&c. and also by the rehearsal of this statute 19. H. 7. c. 1. and this by the opinion of both CHIEF JUSTICES, and the CHIEF BARON of the Exchequer, and A. BROWNE, Justice. See more of the matter of this office, fol. [216. a. pl. 55.] Dy. 112. b.

(31) IF a jury in a leet, after oath made to present the articles of the leet, refuse to make presentment according to their oath, the steward who is judge there may assess a fine upon each of them at his discretion for the concealment and contempt: and if it be a jury or homage in a court baron, it is a forfeiture of their tenures, if they are copyholders, by the opinions of CATLYN, DYER, and A. BROWNE. See the like M. 6. & 7. of the now queen, fol. [233. b. pl. 14.]

43. a. 8. Co. 38. b. 1. Ro. Rep. 33. 74. 1. Rol. Abr. 506. [4. Com. Dig. 161. 2. Com. Dig. 523, 524 & 1. Bac. Ab. 483.]

A leet jury refusing to present according to their oaths, the steward may set a fine on them. Or if it be a jury or homage of copyholders in a court baron, it is a forfeiture of their tenures.

Kitchen, 90.

3. H. 7. 5. 1. 10. E. 3. 4.

9. H. 6. 44. b. 11. Co.

2. Bac. Ab. 503, 504.

(31) Trin. 1. Car. B. R. Grey v. Ulisses, Rot. 33. [Latch. 122.] divers resolutions concerning forfeitures of copyholds, which see East. 2. Car. B. R. fol. 8, 9. if a copyholder be demanded to do his services, and he agree to do them, but do not, that this is a forfeiture. If the lord demand his rent of a copyholder, and afterwards appoint a day and place within his manor for payment of it, and he fail, this amounts to a wilful refusal and forfeiture. When the lord demands suit of such a mill, and the tenant refuses it, it is a forfeiture. So if a copyholder erect a mill upon his copyhold, this is a forfeiture.

(32) IN ERROR in B. R. to reverse an outlawry it was assigned for error, that the roll of the award of the exigent testified that the writ was returnable *est. Mich.* and the writ of *exigent* was made returnable *mensse Michaelis*; and at the fifth county court holden between the octave and the month, the party was outlawed. And as it seems, this was erroneous, for the Court ought to give faith sooner to the roll than to the writ, and by the roll the writ shall be controlled and warranted accordingly; 2. R. 3. fol. 12. [11. a. pl. 24.] in error by Barret, 1. that the roll ought to warrant the writ, although the docket or remembrance of the clerks accord with the writ.

Exigent returnable *mensse Michaelis*, entered on the roll as returnable *est. Mich.* Defendant outlawed at a county court between, this is error, for the record is to be credited.

7. E. 4. 15. 46. E. 3. 19. Mo. 712. Jac. Cro. 530.

[See Cro. Eliz. 761.]

Easter Term,

4 Queen Elizabeth.

The keeper of the great seal, when there is no chancellor, may appoint commissioners to hear and determine piracies under 28. H. 8. c. 15. § 1. (a)

Hob. 144. 146.
Jenk. Cent. 5. c. 85. S.C.
11. Co. 59.

* [212. a.]

Ante, 201. b. 285. 203. b.
Mo. 902. R. 71.

[4 G. 1. c. 11. § 7.]

(33) A QUESTION was moved for the Lord Keeper of the Great Seal by the Queen's Attorney at *Serjeants Inn* among all the Judges: Whether a commission of *oyer & terminer* of piracies committed upon the sea according to the statute of 28. H. 8. c. 15. by which commission divers are condemned of piracy, and have their judgments, and yet stayed of execution, be good and sufficient in law, because the four persons who are named in the commission with the Admiral or his deputy were not named by the Lord Chancellor of *England* for the time being, but by the Lord Keeper of the Great Seal, &c. And by the opinion of the CHIEF JUSTICE of the Common Pleas, and the CHIEF BARON, Justice WHIDDON, Justice CORBET, Justice * BROWNE, CARUS, *Queen's Serjeant*, and GERRARD, *Attorney General*, the commission is good enough without the nomination or appointment of the Chancellor, if there were one, because in granting commissions it is not a judicial act, but only a ministerial act: and the intent of the statute was, that the king should not be troubled with the nomination of the Commissioners, but the Chancellor ought to do it without warrant. And the necessity of justice is such, that although there be no Chancellor or Keeper of the seal, the prince ought to punish such crimes; wherefore &c. But CATLYNE, *Chief Justice*, and WESTON, *J. à contra*, because this is a penal law, and shall be taken strictly.

The statute of 5. *El.* c. 18. makes the authority of the Chancellor and Lord-Keeper to be all one; before which the Chancellor had not always the custody of the seal.

(a) 28. H. 8. c. 15. is altered by 11. & 12. W. 3. c. 7. amended by 18. G. 2. c. 30. and by 32. G. 2. c. 25, §. 20. a session of *oyer & terminer* and gaol delivery for the

trial of offences committed upon the high seas within the jurisdiction of the admiralty of *England*, shall be holden twice in every year at the *Old Bailey*.

Paramor's Case.

(34) **NOTE**, That it was agreed for law in attaint in *Kent*, against *Paramor*, that if the defendants in attaint give new matter in evidence to affirm the first verdict which was not given before in evidence to the first jury, the plaintiff in the attaint shall have his answer to this, and disprove it as well as he can: but he cannot give other evidence, or reinforce the evidence first given with more matter than was given and disclosed before.

If the defendants in attaint give fresh evidence to support their verdict, plaintiff may answer and disprove it, but he may not give in evidence any new matter whatever. *Dy.* 301. a. 369. 229. 26. *Aff.* 12. 1. *Roll.* Ab. 285. 34. *H.* 8. 53. b. 3. *Mar.* 129. b. 7. *E.* 4. 19. b. [3. *Bl. Com.* 404. *Bul. Ni. Pr.* 222.]

(35) **MEMORANDUM**, That in *Easter Term* 18. *E.* 3. among the notes of fines it appears, that a tenant for term of life comes by the grand distress in *quid juris clamat*, and claims to hold the tenements for the term of his life, except ten acres of land which he claims to hold to himself and his heirs for ever; and as to the aforesaid tenements (except the aforesaid ten acres of land) he attorns himself, and afterwards the parties by their attornies pray that the fine may be ingrossed. And the whole fine was ingrossed, note, without the exception. And yet in *per quæ servitia* it was found by verdict that one tenant named in the writ did not hold by service on the day of the note and fine; therefore as to this let it not be ingrossed, but of the residue only, &c.

In *quid juris clamat* the tenant attorned as to part, and claimed part in fee, yet the fine of the whole was ingrossed. But in *per quæ servitia*, where it was found that one tenant *non tenuit* &c. it was ingrossed only for the residue. [*Cro. Eliz.* 693.] 2. *Co.* 68. 32. 34. 36. *H.* 6. 23. a. 24. 29. 44. 48. *E.* 3. 34. 24. 7. 11. *H.* 4. 2. a. 23. 1. *H.* 7. 27. a. *Dy.* 135. 209. [But by 4. *Ann.* c. 16. § 9. & 12. *Geo.* 2. c. 19. attornment is rendered unnecessary. See *Dough.* 282.]

(36) **I**T was moved for a question, If the sheriff has returned a rescous made from him by the party and others, whether they shall have a traverse to this return, or not. And as it seems, they shall have it. And see this in *Lib. Intrat. fol.* 58. But there it appears that the rescuers rendered themselves in court, and were committed to the

If the sheriff return a rescous, the party is entitled to traverse it.

7. *H.* 7. 4. b. 19. *E.* 3. *Execut.* 247. 3. 13. *H.* 7. 15. a. 21. b. 3. 8. *E.* 4. 20. b. 15. b. 2. *R.* 3. 12. 5. *E.* 4. 95.

A rescous is made, and afterwards the sheriff arrests the party, and returns *cepi corpus*, upon affidavit no attachment shall issue, for the return was *cepi corpus*, but he shall be bound over to the assizes. *Mich.* 3. *Jac. B. R.* 11. *H.* 4. 12. b. It was resolved that upon a *latitat* to take a freeman, if the sheriff return a rescous against eight, they being in *Westminster Hall*, the Court awards that they shall be committed to prison, and shall pay their fines, and they were not admitted to their traverse, by the rule of the court. And *per WILLIAMS, Lady Russell's case* [*Cro. Eliz.* 780.] was ruled accordingly. But if the return was false, an action on the case lies against the sheriff. It seems from this that the statute *West.* 2. c. 39. is only in affirmance of the common law.

Averment, 27.
R. 777. Jo. 207.
5. 18. E. 4. 1. 2. 5. 2.
2. H. 4. 14. a. 1. H. 5.
14. 26. 27. H. 8. 7.
22. Dy. 349. Palm.
532.

Fleet at the request of one who sued for the king, and there in custody they traversed the rescue, *s. non culp. per patriam*. And the other who sued for the king *è contra*. And upon this he was let to mainprise. And according to this in *M. 13. R. 2.* [*Fitz. Ab. Tit. retourne de vicount, 74.*] the sheriff returned upon a *capias, cepi corpus*, and delivered it to the constable of the castle of S. within the same county, and an abbot came thither with force and arms, and retook him out of his custody &c. And upon this a *capias* was awarded against the abbot, who came by mainprise * upon a *superseas* out of chancery, and pleaded not guilty. And he was received to traverse notwithstanding the return of the sheriff, and made his attorney, because he came *gratis*, out of custody; but *note* the sheriff had charged himself by this return *per Curiam*, because he had the body at one time &c. And see the statute of *West. 2. c. 40.* [39.] which says, "*And if percase the sheriff, when he cometh, do find resistance, he shall certify to the Court the names of the resisters, aiders, consenters, commanders, and favourers, and by a writ judicial they shall be attached by their bodies to appear at the king's court, and if they be convicted of such resistance they shall be punished at the king's pleasure.*" This word *convicted* proves that they may have a traverse &c. according to *H. 13. E. 4. Rot. 3. inter placita regis*, by Lord CATLYN, where the defendant acquitted by *nisi prius* went without day, and *quare* *H. 5. H. 8.* [Keilw. 165. b. pl. 1.] in one or other of the Benches a traverse to rescue returned, received, and allowed.

* [212. b.]

42. E. 3. 1. b.
10. H. 7. 12. 28.
7. El. 241. a. Fitz.
102. c.
3. Co. 52. b.

5. E. 4. 83.
Br. Averment, 7. fo.
211. b.
14. Jac. Cro. 419.

[See Comberb. 295. 2.
Jon. 39. and the cases collected in 5. Com. Dig. 440. that it is not traversable, but *per* Bul. Ni. Pr. 63. it seems traversable.]

2. Keb. 170.

Robert Read against Thomas Lawnsfe and Dorothy his wife.

H. 2. Eliz. Rot. 716.

The lessor of land and implements with it entered on his lessee and made a feoffment thereof, and the lessee re-entered upon him. The

(37) A MAN made a lease of a house with divers implements contained in it by indenture for a term of years rendering a rent, and afterwards the lessor entered upon the lessee and ousted him, and enfeoffed a stranger in fee,

(37) *M. 33. 34. Eliz. B. R.* entered *E. 33. Eliz. B. R. Rot. 337.* [Cro. Eliz. 255.] *Emott* and *Dorothy* his wife, plaintiffs, in debt for performance of covenants. The case was, A man leased certain land and stock of sheep for years rendering rent, and afterwards upon recognizance made by the lessor during the lease the land is evicted: and adjudged that there shall be no apportionment of rent, and the lessee shall hold the sheep without any allowance. And LORD WRAY said, that so it was resolved before in *C. B.* for the rent was in its creation entire, and incident to the reversion, and it was rent-service, and by eviction of the land and reversion it ceases to be a rent-service, and therefore it is gone altogether. The books *pro* and *con.* were † 1. *H. 6. 9. E. 4. 1. Dy. 56.*

and

and the termor re-entered, the feoffee died, and his heir for rent arrear afterwards brought debt against the lessee for the entire rent. And first it was demurred in law to the declaration, and it was argued at the bar; and afterwards the demurrer was waived by consent, and an issue joined upon the feoffment; and it was found in *London* at *nisi prius* the last Term for the plaintiff. And a *Curia advisare vult* was entered until this Term; and now judgment was given for the plaintiff by WESTON and DYER, A. BROWNE being absent: for they thought that the action lay for the feoffee notwithstanding that no privity &c. and this by 5. H. 7. [18. b. pl. 12.] where the devisee brought an action of debt. (38) Also that the rent was not extinct because it was incident to the reversion, which is now revived; by 9. H. 6. [16. b. pl. 7.] And also, although the feoffee shall not have the implements, still the lessee is not disturbed of his interest in them, but shall enjoy them during his term, and then the lessor or his executors shall have them again, and there shall be no apportionment of the rent in this case, where there is no eviction of them by an elder title, as it is in 12. or 13. H. 8. [12. H. 8. 11. b. pl. 5.] but the rent above shall follow the reversion of the land, which is more worthy, and not the reversion of the chattels. See the like, 9. E. 4. [1. a. pl. 1.] and 21. E. 4. [28. b. pl. 24.] And yet in this Term defendants in the case above brought a writ of error: *quare* the event thereof. And the errors were, that the said rent was extinct by the ouster of the termor, and feoffment &c.; also because *Reade* made no title to the implements, but only to the reversion; and the third error was for the uncertainty of the county aforesaid *, *s. Middlesex* and *London*, for the lease was supposed to be made in the parish of *Saint Martin's in the Fields*, which is in the county of *Middlesex*, and the *Greyhound* in *London*, and the action of debt was brought in *Middlesex*.

feoffee may now bring debt for the whole rent, and there shall be no apportionment.

The lease of the Greyhound in Fleet-street.

Benloe, fo. 58. ca. 35.

[1. And. 4. Benl. 81. S. C.]

21. E. 4. 29.

3. Bullf. 291.

5. H. 5. 12. a. 2. H. 5.

4. 3. H. 6. 1. a. 45.

46. E. 3. 3. 20. and 25.

13. H. 7. 26. b. 3. Co.

22. 9. H. 6. 16. b.

28. H. 8. 31. a. 6. Co.

70. a. 69. a.

Br. Extinguishment, 3.

30. E. 3. 7. 24. H. 8.

4. b. Mo. 11. 1. Inst.

319. a.

[Gibb. on Rents, 175.

Bac. Ab. Tit. Rent, M.

and see 1. Term Rep.

310. 710.]

22. H. 8. 11. b. 35.

H. 8. 56. a. 5. Co. 17.

a. 30. H. 8. 135.

Br. Apport. 7..

7. H. 7. 5. a. Dy.

110. 360, 361.

1. H. 8. Cro. 163. 153.

Dy. 40. 69.

8. 38. H. 6. 25. 15.

[* 213. a.]

[1. Lev. 114. 2. Sta.

776. 2. Term Rep.

441.]

(39) IT was found by office that *W.* died seised of a manor holden of the queen *in capite* in socage, and also of other manors holden of others by socage, his heir of full age. The question was, whether the queen shall have prerogative of the *primer seisin* of all the manors, and the heir driven to

IN CUR'. WARD'.

Where a man dies seised of lands holden of the king *in capite* in socage, and also of other lands holden of other lords in socage, his heir of full age, the king shall have

primer seisin of all, but livery shall be sued for those lands only which are holden *in capite*.

Ley. Rep. 23

Plow 109. b. 204. b.

7. Mar. 123. b. 20. El.

362. a. Fitz. 256. c. adjudged contra.

B. N. C. 322.

Stamf. Prærog. 14.

Fitz. N. B. 13. b. 14.

B. N. C. 188.

Kitchen, fo. 129.

Br. Livery, 60.

[By 12. Car. 2. c. 24. all feudal tenures and their consequences were abolished.]

Dy. 362.

sue out livery of all the manors, or but of that only which is holden *in capite*. And as it seems to me, the queen shall have *primer seisin* of them all, because no other person, s. guardian in chivalry or guardian in socage, is entitled to have the profits of the land after the heir comes to the age of fourteen years. And the statute of *Marleb.* [52. H. 3.] c. 16. and *de prærogativâ regis* [17. E. 2.] c. 3. are general for the *primer seisin* of the inheritance which is holden *in capite*. And so thought *Stanford* in his Treatise *de prærogativâ regis*, c. 3. yet he puts a *quære*. And *Fitzherbert*, in *Natura Brevium*, fol. 256. is not against this opinion, where he puts a case, that if lands of socage tenure *in capite* are seized into the hands of the king with other lands holden of others by other services, the other lords shall have *ouster le maine unâ cum exitibus* of the lands holden of them, and this cannot be intended but of lands holden of them by knight-service, for otherwise they have no reason to have the profits. (40) And note the form of the writ of *diem clausit extremum* is general, and therefore intendable as well of socage *in capite*, as of knight-service *in capite*. See the form of the writ thereof in *Nat. Brev. Fitz. fol. 252*. But note that the precedents of the exchequer are to the contrary, s. that livery shall be sued only of the lands holden *in capite* of the king, and an *ouster le main unâ cum exitibus* for the residue holden of the king, or of other lords in socage, as appears in the liveries of *Thomas Lewknor*, 19. E. 4. Rot. 10. and 13. and 31. H. 8. Rot. 5. for the heirs of *Daniel*. And in the first year of king H. 8. after the death of *Appleton*, and 10. H. 8. for *Wayte*. And it seems by these that the escheator had seized first all the lands of such tenant *in capite* according to the writ of *diem clausit extremum*, but now all these liveries are out of use, and every man in effect driven to sue special livery. And this question was moved again in the court of wards, *East.* 16th of the present queen; and then ruled that the livery shall be of the tenure *in capite* only, according to *Brooke Tit. Gard.* 97. and *East.* 20. of the present queen, for the heir of *Christopher Canningesby* in the court of wards.

Hil. 16. El. Cur'. Ward'. & *Pragley's* case, fol. 120. by the Judges, that for tenure in socage *in capite* livery shall not be sued of other lands holden by mean rates, but only of those holden in socage *in capite*, and fol. 421. such heir shall not sue livery if he be within the age of fourteen at the death of his ancestor, but *ouster le maine*. See my book of Wards, fol. 87. and 49.

Parker against Poynett.

* (41) **T**HE husband and wife being seised for the term of the life of the wife, remainder over to a stranger in tail, remainder of the fee also to the same tenant in tail, a fine upon a writ of covenant brought by him in remainder complainant against the said husband and wife deforciant, was levied in the second year of E. 6. by which fine the husband and wife acknowledged the aforesaid tenements to be the right of the said complainant as those which he had of the gift &c. with a release to him and his heirs for ever: and by this concord the other who was tenant in tail remainder as above for this acknowledgment &c. granted a rent-charge out of the same land to the husband and wife during their lives; and this fine with proclamations according to the statute of 4. H. 7. [c. 24.] And then the wife died, and afterwards the tenant in tail had issue and died, and his issue entered, and the husband distrained for the rent; and the farmer of the issue brought replevin, and upon a cognizance and bar to it, the parties have demurred in law whether the rent be determined against the issue in tail, or not. And the case was never argued; but by the better opinion, the issue shall not be charged by this fine, wherefore the matter was quieted by the arbitration and industry of *Bendlowes*, who was the counsel for the defendant. A similar matter was argued in *B. R.* upon a demurrer in law between ———, *Mich.* 10. of the present queen [post. 279. a. pl. 7.].

If a wife tenant for life remainder over in tail, levy a fine *came eco* with proclamations with her husband to the remainder man, who renders them back a rent for the lives of both, on the death of the wife and of him in remainder, the issue in tail may avoid this rent.

[Bendl 93.]
Bendl. in Keilw. } S. C.
210. 1. And. 6.
3. Co. 89. b.
Bendlowes, 15. cap. 29.
6. E. 3. 22. b.

Where tenant in tail only accepts a fine, and then grants and renders a rent out of it, the issue shall not be bound, for he shall be remitted † to the land.

[See] Plow. 435. b.
Br. Fines Levy, 106.
118. Cro. Jac. 699.
44. E. 3. 22. a. 8. H. 6.
23. a. Plow. 141. a.
Dyer, 370. Coke, 76.
11. H. 4. 84. b.
But it seems that the rent shall bind the issue in tail for the reason given in 1. Co. 94. b. 96. b. Shelley's case, 10. Co. 37. b. Marg. Portington's case 44. E. 3. 21. 3. Co. 90. a. the case of fines, agreed that the issue shall not be charged by this fine. [Shep. Touch. 29. 24. a. Bac. Ab. 531.]

† Orig. *al br'*.

(42) **M**EMORANDUM, That *Andrew Billisbie*, of the county of *Lincoln*, holds by hereditary right the office of usher of the exchequer of our lord the king, with divers other offices belonging to it, *viz.* offices of ushers and cryers in *C. B.* marshalls, ushers, criers, and † *bar-keepers*, in each of the iters of the Justices itinerant within the kingdom of *England*, and five-pence every day in the receipt of

The office of usher of the exchequer is holden of the king by grand serjeanty.

2. Aff. 7. F. N. 2. 266. 8. 7. R. 3. 57. 58.

† Orig. *barriarium*.

R r

the

[Madox Hist. of the
Exch. vol. 2. from p.
271. to p. 281.]

the exchequer aforesaid, to be taken in the said office of
usher of the exchequer of our lord the king by grand
serjeanty; and it is worth annually twenty marks besides
reprisals. And this appears in the record of the exchequer
of the times of E. 3. H. 4. H. 6. and E. 4.

Jurden against Ap-howel,
and

Feron against Ashton.

A *tales* of sixty awarded
in appeal of robbery, and
in appeal of robbery se-
venty-five jurors re-
turned on the panel.
15. 18. E. 4. 33. b. 6 b.
7. H. 8. Cro. 178.
Stamf. 155. a. 14. H. 7.
7. a. Br. Octo Tales, 8.
37. H. 6. 12. a.
[2. Hawk. 575. 3. Bac.
Ab. 245.]

(43) NOTE, That Mich. 15. H. 8. in *Midd.* before the
king, a *tales* of sixty was granted in an appeal of
felony and robbery between T. Jurden and L. Ap-howel;
and also T. 14. H. 8. between Feron and Ashton, in an appeal
of robbery the sheriff of Surrey returned seventy-five jurors.

Digges' Case.

If a *capias utlagatum* go
into *Middlesex* against a
defendant called late of
London, alias *dictus* of *M.*
in the county of *K.* and
the proclamations were
in *K.* when in fact he
was commorant in *Mid-
dlesex*, he may avoid the
outlawry under 6 H. 8.
c. 4. without writ of
error.

Put if the action be
brought in another coun-
ty than *London* or *Mid-
dlesex*, the proclamations
need not be where he is
commorant, and if he
be wrong named in the
writ he may avoid it by
the statute of additions.

* [214. a.]

[Berl. 122.] } S. C.
1. And. 36 }
An. Berl. 26. }
2. Inst. 670 Dy. 206.
192. 30. 32. 36. H. 6.
g. 28. and 33. 28.

(44) A *CAPIAS UTLAGATUM* was awarded to the sheriff
of *Middlesex* against William Digges, late of *Lon-
don*, gentleman, otherwise called William Digges of *Newing-
ton* in the county of *Kent*, gentleman, outlawed in *London*
&c. and a writ of proclamation was awarded to the sheriff of
Kent, and returned served. And now this Term came the
said Digges in custody of the sheriff of *Middlesex* by a *cepi
corpus*, and pleaded in discharge of the outlawry that he was
commorant and conversant at the Vill of *Saint Katharine* in
the aforesaid county of *Middlesex* * on the day that the
exigent issued, in which county no writ of proclamation was
awarded according to the statute of 6. H. 8. [c. 4.] and as it
seems he shall well have the plea; for the *alias dictus* above
is no part of his fir-name, nor is intended part of his name:
and therefore no proclamation ought to have issued to the
sheriff of *Kent* as it ought if he had been expressly called in
the writ, of *N.* in the county of *Kent*, or, late of *N.* in the
county of *Kent*, for then of necessity the proclamation † should
be there. And also a man is sued in *Kent*, and is called of *D.*

† Orig. *isservit*.

or *late of D. in the county of Essex*; and the truth is, that neither at the time of the purchase of the original writ, nor the day of the *exigent* awarded, was he commorant or conversant there, but in *Suffex*, where no writ of proclamation is awarded, but only into *Essex*: yet the outlawry in *Kent* is good enough by this statute of 6. H. 8. [c. 4.] because the proclamation issued into the county of which he was called &c. and if it be false, then he may avoid the outlawry by the statute of additions, 1. H. 5. [c. 5.] But in the case above, it seems, he might well avoid the outlawry, although he was called *late of London*, if he had removed his habitation into another county at the time of the *exigent* awarded. And so is it of original process in *Middlesex*, s. *late of the city of Westminster*, or, *of Westminster*, but not so of other counties. Note well the words of the statute of 6. H. 8. [c. 4.] for *London* and *Middlesex*. And as it seems the cause of their privilege was, because the resort of people of all parts of the realm in the Terms and out, is more to *London* and *Westminster* than to any other place. And by reason of this they may be named in suits against them, *of London* or *Westminster*, or, *late of London* or *Westminster*, although their habitations and commorancies are not there.

1. 4. 7. 21. E. 4. 1. 107.
10. 15. 2. Ante, 50.
b. 4. H. 4. 10. 21.
H. 7. 13. 33. B. N. C.
49. R. 206.

[2. Hawk. P. C. 434.
650, 651. Salk. 496.
3. Bac. Ab. 767. And
see further of errors in
outlawries, 4. Burr.
2563 3. Term Rep.
499. and 4. Term Rep.
521. 5. Term Reps
202.]

Mo. 70. Ante, 192. b.

19. M. 6. 1. a;

Trinity Term,

4. Queen Elizabeth.

Judgment by *non sum informatus* on 8. H. 6. c. 9. is equal to a conviction, and defendant shall forfeit treble damages. So on *nihil dicit* in waste. And on the trial, if the plaintiff do not appear, he shall be non-suited, though the jury be not there, or even though no panel be returned.

1. And. 25. S. C.
22. H. 6. 57. Ante, 204.
11. Co. 36. 60. Dyer,
93. a.
[Jenk. Cent. 5. c. 8.]

* [214. b.]

Dy. 223. b. 265. a.

29. 48. E. 3. 18. 32.

[See Com. Dig. Plead-
er, X. 1.]

(45) **M**EMORANDUM, That in *Hilary Term*, in the second year of *Henry 8. Rot. 513.* in a writ upon the statute of forcible entries of the eighth year of *H. 6. [c. 9.]* defendant was condemned by a *non sum informatus*, and damages by inquiry before the sheriff by reason of the entry aforesaid taxed at thirty-three pounds, and for the costs at six shillings and eight-pence, and *Cur' advisar'*. And afterwards the plaintiff recovered the damages aforesaid trebled, which amount to one hundred pounds, & *defendens capiatur*, whereof to the clerks C. s. See well, that the condemnation above is a conviction &c. and so is it, as I believe, if it be in waste by *nihil dicit*, although the statute of *Gloucester [6. E. 1.] c. 5.* is, *that he who shall be attainted of waste shall lose the thing wasted.* (46) Also in the same *Hilary Term, Rot. 149.* it appears, that in a writ upon the statute of * 5. R. 2. [ft. 1. c. 8.] after the issue at the day of the *jurata*, before the appearance of the jury the defendant appeared, and plaintiff does not prosecute, therefore both parties are then demandable; and in the *postea* of *nisi prius* the appearance of the parties is first recorded, and the jurors of the jury (whereof mention is made below) being called, come likewise, who &c. And although the writ and panel of the jury be not returned, yet the plaintiff being demanded, and not coming, shall be non-suited, by *H. 12. El. fol. [286. a. pl. 44.]*

Execution awarded on *fi. fa.* in C. B. the defendant being in the Fleet for another cause, and brought into the Bench by *habeas corpus*, on examination proving to be the same person, may be re-committed in execution

(47) **A**LSO in the same *Hilary Term, Rot. 152.* execution by default was awarded in *scire facias* upon a judgment in debt: and the defendant, after the year and day, s. four years afterwards, was in the Fleet for another cause, and by *habeas corpus* he was brought into the Bench, and being examined by the Court whether he was the person who was condemned as above, he admitted it, wherefore he was

committed to the same prison for the said condemnation, there to remain until &c. *Note this after the year and day, without a new scire facias.*

without *scire facias*, though more than a year have intervened.
Dyer, 152. 306. 14. 15.
H. 7. 18. b. 5. Co. 88.
[2. Crompt. Prac. 101.]

Stone's Case.

(48) **A** MAN committed two felonies on the same day, and for one of them he may have clergy, and not for the other. First, he is indicted of the felony, for which the clergy lies, and arraigned of it, and pleads not guilty, and is found guilty, and asked for the book, and the book being delivered to him, note, *legit ut clericus*; and this is entered by the clerk, but no mention of *tradatur ordinario*; and yet he is reprieved without judgment. And afterwards at another session he is indicted for the other felony, and is arraigned upon it: and he pleaded not guilty, and was found guilty, and there fought the book and had it, and he read, but is not burnt, nor delivered to the ordinary: and all this is entered with a *Curia advisare &c.* And judgment has been respited for a year and 'more. And now the question was moved by the recorder of London before whom and others the plea was, whether he shall have judgment to be hanged, or shall be delivered to the ordinary as a clerk convict? And it was well debated at *Serjeants Inn*, by all the Judges of both Benches, and of assize, and seven against seven, *s. CATLYN, Chief Justice, A. BROWNE, Justice, BENDLOWES, POUNTREL, WELSHE, and HARPER, Serjeants, and GERRARD, Attorney General*, held, that he should have judgment to be hanged, because no judgment of clerk convict was given against him. And also the second offence for which he was arraigned shall be intended best for the queen, *s. that it was committed after the first arraignment, and then auterfoits convict cannot help it.* But DYER, *Chief Justice* of the Bench, SAUNDERS, *Chief Baron*, WHYDDON, CORBET, and WESTON, *Justices*, and CARUS, and CHOLMELEY, *Serjeants*, to the contrary, because the respite of the words *tradatur ordinario* is the default of the Court, and ought to have consecutively * followed the entry above. And also his life was once put in jeopardy. And it shall not be intended that the felony for which the clergy does not lie was committed after the other, because it is supposed by the indict-

Where a prisoner is indicted for two felonies, the one capital, the other clergyable, and is tried on the latter first, found guilty, *et legit ut clericus*, he should not be burnt, nor a *tradatur ordinario* entered, till he is tried for the higher crime, as it would discharge him from that and all other felonies committed prior to the conviction.

2. E. 3. 9. a. 6. E. 4. 4. b. 14. EL 308. a. 6. H. 4. 7. b. Vide stat. 18. EL c. 7. Hob. 290. Stamf. 107. b.

[Carth. 17, 18.]

[1. H. H. P. C. 353. 386.]

* [215, a.]

3. Inst. 213.

ments to have been done all on one day without priority of time, and then, *in favorem vite*, the best shall be taken. (49) And this case was the case of *Stone*, now a prisoner in *Newgate*, who robbed my lord Treasurer at *Austin Friars*, and *Devych* his servant. And note, although the felony above, from which clergy is taken away, was committed after the other, yet if the felon for the other felony was adjudged in law as a clerk convict, although he was not delivered to the ordinary, then he ought not to have been arraigned upon the last indictment, because by this conviction he is discharged of all other felonies by him committed before this conviction. And see in *libro Stamford*, fol. 108. that he ought to be charged with all crimes imputed to him before he has his clergy allowed, or at least departs from the bar; for on the same day, and as soon as the Court have recorded that *legit ut clericus*, he shall be called the prisoner of the ordinary, although he be returned to the prison whence he came, or else the statute *de clero*, 25 E. 3. c. 5. would not be observed. (50) And note, the form of the entry upon a claim of clergy (according to some) is thus, *s. et tradito ei libro legit ut clericus, et traditur ordinario*; and not a judgment made of it, *s. ideo tradatur ordinario &c.* See in *Nat. Brev. Fitz.* fol. 66. in a writ *de cautione admittenda*, where clergy was allowed, the ordinary being absent when he was demanded, for which he was remitted to gaol, and a special writ out of chancery directed to the Justices of gaol [delivery] at the suit of the ordinary, that they should command the gaoler to deliver the clerk to the ordinary &c. But it is said by the clerks of the King's Bench, that the form of the entry of a clerk convict is, *ideo tradatur ordinario* in the King's Bench. Note this. And afterwards, *s.* on the 28th day of *May*, in the eighth year of the present queen, the said *Stone* was indicted for the murder of *Agenor*, who was the son of the said *Devych*, and principally privy to the said robbery, the next day after the offence committed, which was in *April*, in the first year of the now queen: and the murder was committed at *Marybone Park*, and there the body interred at a pond-head. And he was found guilty, and had judgment that he should be hanged; and this was on the accusation of *Whitney* and *Durant*, prisoners in *Newgate* for debt, on *Stone's* own confession, at a time when the prison was to have been broken, and an escape to be made by the device of

Stone

21. El. 3. 5.

Stat. 8. El. c. 4. cont.

18. H. 8. 2. Hob. 293.

Stamf. 66. b. 10. b.

[4. Bl. Com. 373*, 374*.]

Dy. 45. 308.

W. Corone, 11.

Hob. 299.

18. El. c. 7.

Raft. Clergy, 28.

[See note (a) to Dy. 205. a. pl. 6.]

[2. Hawk. P. C. 604.]

Stone &c. But the execution of *Stone* was respited by command of the CHIEF JUSTICE; but at length he was executed.

[* 215. b.]

(51) AN issue was entered of *Michaelmas Term* last, and a *venire facias* awarded upon the roll, returnable on the octave of *Saint Hilary*, but no writ issued, nor in *Hilary Term*, wherefore defendant prayed a *venire facias cum proviso* * returnable on the morrow of the present *Trinity*, and had it. And plaintiff perceiving this, prayed also a *venire facias* returnable on the same day, and had it; which writ was served, and the panel returned upon it now, and nothing done with the other writ *cum proviso*: now the defendant prayed a *habeas corpora* with *nisi prius*, and with a *proviso* returnable on the octave of *Michaelmas* next. And BROWNE thought that he might have it, because plaintiff once made default in the prosecution of the *venire facias*, and this suffices for all the process, to be prayed with *proviso*. (52) But as I think, he shall not have his request; for here appears no *laches*, or default in the plaintiff of record, but only by parol, because the writ which was with *proviso* was not returned, but the writ that plaintiff sued out; otherwise it would have been if the writ with *proviso* had been served. And so seemed it to LEONARD chief clerk. But if plaintiff will not sue out the *nisi prius* this Term, the defendant at *Lent* may sue out one with *proviso*. See *H. 3. H. 6. M. 8. H. 6. [6. a. pl. 14.] 16. H. 6. [19. H. 6. 46. b. pl. 99.] East. 33. H. 6. [14. pl. 3.] H. 21. H. 6. [22. b. pl. 2.]* for these writs with *proviso*. And it seems much of this depends upon the discretion of the Court, but for the greater part it is not grantable for defendant, if he be not an actor as well as the plaintiff, or some default and *laches* be in the plaintiff. *Simile ante*, fol. 193. a. and *post*. fol. 217. and *M. 14. fol. 318. and Trin. 4 16. El. fol.*

A *venire facias cum proviso* is not grantable to the defendant, but where he is actor, or where there are *laches*, or default in the plaintiff, yet one *laches* suffices for the whole suit. But if after defendant hath sued that out, the plaintiff sue out a *venire facias* which is served, and not the defendants, he shall not have a *habeas corpus cum nisi prius cum proviso* without fresh *laches* since none appears on the record.

2. Rol. Abr. 666. Dy. 284. 308. 328. 1. Keb. 101.

24. E. 3. 65. Dy. 217. a. 318. 284. a.

26. E. 3. 6. 5. 3. H. 6. Ex. Process 56. 65. 68.

21. H. 6. Nisi Prius 9. 9. E. 4. 15. 7. H. 8. Kelw. 176. Stamf. 155. R. 300. 14. H. 7. 7. a. Dal. in Kelw. 204. b.

[3. Bac. Ab. 246. and the books there cited, & 1. Crompt. Prac. 219.]

Lord Sandes' Case.

(53) *SCIRE Facias* brought by Lord Sandes being under age upon a fine levied in the 2d year of H. 8. to have execution of a remainder in fee as right heir of one

Defendant pleading to a *scire facias* on a fine since 4. H. 7. c. 24. "that the parties the fine

"*had nothing*," must add "*neither in possession nor in use*," conformably to the statute.

See the record of this case in Co. Ent. title *Scire Facias*, pl. 12. fo. 629. b. 40, 41. E. 3. 30. b. 24. a. 3. H. 7. 9. a. 28. 33. H. 6. 57. a. 18. & 21. 12. E. 4. 13. a. 12. E. 9. 1. a. 27. H. 8. 4. [3. Com. Dig. 353. Cruise on Fines, 310.]

Plowd. 195. 21. H. 7. 25.
27. H. 8. 20. b.

M. Sandes his grandfather; and as to part the tenant pleaded, *that the parties to the fine had nothing at the time of the fine levied, but one A. B. &c.* And whether this exception or plea to this fine levied since the statute of 4. H. 7. [5. 24.] of fines be good (without saying, *nor any other person or persons to the use of them or either of them* according to the same statute) or not, was much doubted, because no precedent had been seen of such a form of pleading, as is expressed and given by the statute. For no *scire facias* had been brought of so new a fine; (*ut credo*.) But the clear way seems, that at all times since the statute of 1. R. 3. [c. 1.] of grants, feoffments, &c. by *cessuy a que use* such form of pleading ought not to be allowed. And if the truth be that one of the parties to the fine was *cessuy a que use* only, then the plaintiff may retain his writ as above well enough by shewing that, and it shall be no departure; for the writ of *scire facias* does not suppose any feisin in any of the parties, wherefore &c. And see a precedent of the form of pleading as above in the assise of the duke of Norfolk and others against *Brage* and others, before CONINGESBY and FITZHERBERT at Northampton, in the 23d year of H. 8. which passed upon good advisement. And note that in the case above issue was joined, *that the parties to the fine had nothing in possession or use, nor any of them &c.* And the issue was found accordingly, and against the plaintiff, Trin. 5. of the present queen, ante 210. 26.

* [216. a.]

Where any proclamation on a fine levied by tenant in tail is made out of Term, the proclamations alone shall be reversed, but the fine shall stand and be a discontinuance.

[See] Plow. 265. a. 266. a. S. C. & ante 182. b. [1. Bull. 206.] 7. E. 3. 35. 27. H. 8. 23. b. West's Precedents Fines fo. 5. sec. 19. 71. 192. [Cruise on Fines, 45.]

*(54) A FINE with fifteen proclamations only (whereof also one proclamation was out of the Term) was levied in the 32d year of H. 8. by the tenant in tail: the question is, Whether the entire fine, or only the proclamations shall be void and reverfable by writ of error. And this case is now pending in the Court of Wards, and the like in effect in B. R. in error: but afterwards, judgment was given for the reversal of the proclamations only, and that the fine should stand in force, and make a discontinuance.

Sir Robert Chester's Case.

(55) **M**EMORANDUM, It was resolved by all the Justices of both Benches, and by all the Barons of the Exchequer (at the instance of my lord keeper of the great seal) that the office of the receivership for the counties of *Middlesex, Essex, Hertford, and London*, (for the lands of the late court of augmentations and revenues for which *Sir Robert Chester* knight sued *Lord Hastings* of *Loughborough* in the chancery) is not in being, but extinct, and determined by the act and letters patent of Queen *Mary* in her first year concerning the dissolution of the said court, the office being as it were incorporate with the said court, in which, consideration was first had to the erection of the said court and dissolution of the first court, which dissolution and erection were made by letters patent of *H. 8.* in his 38th year; and after the act of confirmation thereof in the 7th year of *E. 6.* [c. 2.] And then the act of the first year of Queen *Mary* [sess. 2. c. 10.] with the sayings and provisos of it, and then the letters patent of the said Queen *Mary* dated the 23d day of *January* in her first year for dissolving the said court, and the letters patent for uniting it to the exchequer dated the next day after, which is *quasi absurdum et impossibile &c.* And the schedule annexed to the said patent in which the first and last articles are chiefly to be noted for this matter. And accordingly it was decreed against *Sir Robert Chester* this Term for the office with a saving of his fee according to the proviso of the statute of the first year of Queen *Mary*: and for the arrears *Curia advisare vult.*

The office of receivership of the court of augmentations is so incorporated with that court as to be void on its dissolution by act of parliament.

Jenk. Cent. 5. c. 86. S. C.

9. El. 253. a

[Skin. 612.]

4. Inst. 122. 7. E. 4. 22.
Br. Patents 60.
Dier, 71. b.

Mar. Cap. 20. Rast.
Courts, 3.

(56) **N**OTE, That it was holden by the Justices in a *formedon* in the *reverter*, if the tail be spent, the donor or his heirs need not shew in the writ, or count, in the *et qua post mortem* the name of any of the issues inheritable to the tail, although the donee had divers in lineal descent after him, because he is a stranger to the pedigree of the donee, but it is sufficient to say, *and that after the death of the donee it ought to revert to him, because the donee died without issue &c.* Accord' *M. 18. E. 2.* and *M. 22. H. 6. fol. 41.* in a *nota*. It is otherwise in a *formedon* in the *descender*, for

In a *formedon in reverter* the donor needs not name the issue of the donee, but say *qua post mortem* of the donee without issue &c.

Scus in the *descender*, where he must name the heir last seized. *Quare in the remainder?*

8. Co. 88. a. 44. E. 3. 4.
28. H. 8. 16. b. 42. E. 3.
20. a. Fitz. 220. c. 7.
H. 7. 7. b. Br. Formedon 37. 10. E. 3. 48. Br.

there

674. 18. E. 2. Formedon, 58. 22. H. 6. 36. a. 44. E. 3. 40. a. 12. E. 4. 15. a. 40. 43. 48. E. 3. 8. b. 7. b. 7. a. 18 E. 3. 28. 46. E. 3. 9. b. 8. 11. H. 4. 21. 72. 33. H. 6. 18. 42. 44. E. 3. 30. 40. a. Dy 247. b. 292. Plow. 233. 247. 26. E. 3. 75. [Booth's Real Act. 143. 153. 155. & 5. Mod Rep. 17. 5. Com. Dig. 308, 309.]

* [216. b.]

Rot. 1323 or 1324.

A and *B.* submit "di-
" lapidations and all ac-
" tions, &c. ita quod the
" same award be deli-
" vered &c." The a-
ward made recites the
arbitrator elected be-
tween *A.* in the name and
for the behalf of *C.* and
B., and orders only that
B. shall repair; but re-
fuses to decide on any
other action. This is
good as far as relates to
the proper parties, but
as the submission was
conditional, and the a-
ward not of all the mat-
ter submitted, it is void
for the whole.

Mich 3. & 4. El. Rot. 132.
[A. Bendl. 38. S. C.]
N. Benl. 107. S. C.
1. Sand. 32, 33.
1. Rol. Rep. 377.

* Browne 'against' Meverell, Executor.

(57) **D**E B T on bond with this condition, s. "That if
" the above bounden defendant do perform and
" keep the award, arbitrement, order, and judgment of *Michael*
" *Purfrey* Esquire, arbitrator indifferently appointed and
" chosen by the aforesaid parties to arbitrate &c. of, for, in
" and upon the dilapidations of the parsonage of *S.* in the
" county of *D.* being and remaining in decay and ruin, by
" the default and after the death of *A. B.* clerk, late parson
" there; and also of, in, and upon all and singular actions, suits,
" quarrels, and debates, and strifes had, moved, or now de-
" pending in variance betwixt the said parties &c. so that the
" same award be made, sealed, and delivered in writing under
" the seal of the said arbitrator before &c. that then &c."
The defendant pleaded, that before the said day &c. the ar-
bitrator aforesaid made no award &c. between the parties
aforesaid of and upon the premises in the said condition spe-
cified, and this &c. And the plaintiff in the replication al-
leged the award in certain, and assigned the breach, and de-
fendant rejoined, and maintained his bar precisely without
saying, such award, therefore let twelve. And the jury gave
a special verdict, and found the award made in writing ac-
cording to the truth of the fact in these words: (58) "The
" award

(58) *Trin. 3. Jac. B. R. & Holcroft and Gibbon's Case*, *POMHAM* said, that he had seen
an ancient charter granted to the Abbot of *Reading* by the King of *England*, to make
knights; upon which his conceit was, that the Abbot made ecclesiastical persons knights:
thence as he thought the names of *Sir John* and *Sir Will.*, which are given to some clerks
at this day, are derived: which opinion *COKE*, *Attorney General*, applauded, saying that
there were *milites caelestes* and *milites terrestres*, fol. 29. pl. 222

Anciently by the priests of the higher churches, with the administering of solemn rites,
young men were invested with the dignity of military and equestrian orders. So we read
that *Lanfranc* the archbishop created *William* the Second a knight. *Seld. Eadmer* [lib. 3.
p. 68.] 207. *Camden*. *Brit* 126. *Analcct.* 108. & 144. 1. *Malm.* [de gestis regum.] lib. 4.
Ingulph. 312 (a).

(a) See the charter to the Abbot of *Rea-*
ding above cited in *Dugdale's Monasticon*,
vol. 1. page 417. which is also cited in *Seld.*
Tit. of Hen. 2d Edit. *London*. 1631. pt. 2.

ch. 5. §. 33. pag. 771. 772. and the direction
given in that charter to the Abbot is, "that
" he take care not to confer this rank on chil-
" dren, *maiores autem seu discipulos tam clericos*
" q. 127

"award and order made &c. by me Michael P. arbitrator in-
 "differently elect between I. Brown Esquire, in the name and
 "for the behalf of one Sir William Mote now parson of S.
 "aforesaid of that one party, and Andrew Meverell gentleman,
 "executor of one Sir Robert Yeoman son clerk, late parson of S.
 "aforesaid, of and for the dilapidations and other decays of
 "the same parsonage, barns, and other buildings there, the 23d
 "of September in the first year of the present queen." And
 made order and award, that defendant before a certain day
 should at his costs make reparations &c. for the dilapidations
 and decays above, without making any award of any actions,
 quarrels, debates, and strifes; but he protested in the award
 that he would not meddle with any actions, besides &c. And
 whether the plaintiff ought to recover upon this award was
 moved, because it seems that this award is not made between
 the parties to the suit and bond, but between parson Mote and
 Meverell. (59) Also the award does not extend to all the
 points in the submission; for he has made no award of the
 actions, suits, debates, &c. but has made an express protesta-
 tion in the award that it was not his intent to interfere in
 them; whereby it seems, that he has disabled himself from
 being the arbitrator in the premises, because he refuses to
 make award according to the submission of the parties who
 chose him for arbitrator conditionally as above, s. so that the
 same award &c. which is as well of actions and debates, &c.
 as of dilapidations &c. And it does not resemble a submission
 simply made by parol or writing of two things, * as of actions
 personal or real, and the award is only of one of them, this is
 good for that by 19. H. 7. [19. H. 6. 6. b. pl. 12.] Yet there-
 of see 39. H. 6. 10. dubitatur. (60) And for the other point

[Kyd on Awards 25,
 Kyd on Awards, 23. 1,
 Term Rep. 691.]

17. H. 7. Cro. 43.
 Dy. 242. 2.

17. E. 4. 3. b. 36. H. 6.
 12. 7. H. 6. 4. Arbi-
 trement 2. Benlofe Rep.
 c. 38. 3. Bulstr. 68.

8. Co. 98. a. 10. 131. b.

* [217. a.]

"quam laicos provide suscipiat." Selden in a
 marginal note on Eadmer, lib. 3. pag. 68.
 Edit. Lond. 1726. 2d Vol. pag. 1676. on the
 word clericos says, "ad militum enim armatæ
 dignitatem int. dum etiam qui sacri erant
 ordinis transgredebant." In Matth. Par.
 Edit. Lond. 1640. p. 653. *Joan de Gatchien*
 a clergyman multis ditatus beneficiis is men-
 tioned as receiving this honor from Henry the
 Third, but he adds *se omnibus ante expecta-
 tum resignatis quia sic oportuit.* Seld. Tit.
 Hon. (i.e. citat.) says, "the persons that re-
 ceived it were also sometimes of the clergy
 "who resigning their benefices and spiritual
 "cures betook themselves to secular employ-
 "ments." But this was not always the case;
 for we learn from Oldys Brit. Libr. pag. 70.
 that "Jean Froissard (clerk of the bed-cham-

"ber to Queen Philippa) was knighted, and
 "being an ecclesiastic, well benefited in Eng-
 "land." He was canon of Chimay in Haynault
 and of Lille in Flanders, and rector of Lescines
 on the Meuse near Mons in Haynault. To this
 we may also add, that the Knights of Malta
 are a religious order though not priests but
 church dignitaries, and have a rank in the
 ecclesiastical states. See Domat's Civil Law,
 Vol. 2. pag. 424. Edit. 1737. The reader
 who wishes to see the various conjectures on
 the application of this title to ecclesiastics
 may consult Mr. Steevens' New Edit. of
 Shakspeare in the notes to the title of Sir
 Hugh Evans in the Merry Wives of Wind-
 sor, act 1. sc. 1. and Dugdale's Hist. of War-
 wickshire, pag. 574.

above,

7. El. 242. b. Br. Ar-
bjument, 5. 20. 207.
Dy. 198. b.

above, admitting that the submission above had been between *Mote* of the one part and *Meversell* of the other part, and *Purfrey* had made the award as it is made above, s. between *Browne* in the name and for the behalf of *Mote* of the one part, and &c. would not that have been a good award between *Mote* and *Meversell*? It seems it would. For *Browne* there is no party to the award, but only a deputy or agent for *Mote*. And it is not shewn in all the pleading that *Browne* had any interest in the church or parsonage of S. above by the patronage or lease of it, wherefore he shall be holden as a stranger to the matter of the award &c. And to every award are five things incident, s. matter of controversy, submission, parties to the submission, arbitrators, and the delivering up of the award. And of this opinion were DYER and A. BROWNE. But WESTON held these words (*in the name and for the behalf of Mote*) void. And the plea was continued by *Curia advisare vult* for a year, but no judgment was given by the roll, which see in *Hilary Term* the 18th of the present Queen.

[Kyd on Awards 115,
116. and on the forms
of submissions to awards
see 2. Term Rep. 643.
& 645. and 4. Term
Rep. 146.]

The like was adjudged in *B. R.* [Cro. Eliz. 838.] between *Risden* and *Inglett* upon the same reasons as this book, *East. 42. Eliz. Rot. 514. & Devonshire's Case*.

Bendlofe reports, [fol. 110.] That the opinion of the Court was that the award was void, because it was contrary to the said submission, but the judgment is not entered, for the parties agreed; and the matter was well debated by the Serjeants and Judges. *Vide* fo. 15. pl. 63.

A venire facias cum pro-
viso was returned and
filed, two hours after a
venire facias by the plain-
tiff was also returned
and filed; each party
then sued an *habeas cor-*
pora, which being re-
turned, the plaintiff
failed to continue the
jurata; yet this is no
discontinuance, for the
continuance entered by
the defendant shall suf-
fice.

Dy. 193. 284. a.

[3. Bac. Ab. 246. and
the books there cited,
and 1. Crompt. Pract.
219.]
26 E. 3. 65. a.

(61) T HE defendant after issue, and default made by the plaintiff had a *pluries venire facias* directed to the sheriff of the city of *Norwich cum proviso*: and the plaintiff perceiving it sued out another writ of *pluries venire facias* directed as above: and the writ *cum proviso* was first delivered to one of the sheriffs of N. who served it, and returned a panel which was put upon the file. And within two hours afterwards the other sheriff returned the other writ served with a panel which was also put upon the file aforesaid: and then each party sued out an *habeas corpora* upon the writ which was returned for him; at which day of return the plaintiff did not sue any further, but the defendant did upon his writ *cum proviso*. And now it was moved that the plea was discontinued inasmuch as the plaintiff had failed in continuing his *jurata*. But the Court thought that it was not discontinued, because the continuance of the *jurata* of the defendant

defendant was a good continuance, and served as well for the plaintiff as for the defendant, and there is no difference between the entry of one and the other. And now the defendant prayed the *nisi prius* upon his panel, and that the panel of the plaintiff should be taken off the file, because it came in the latest &c. *Vide antea*, folio 215. See a good case for such process, *Mich.* 14. fol. 318. 10.

* [217. b.]

HEREFORD.

• (62) **T**HE Bishop of *Hereford* certified a plenarty this Term without making mention of the induction, but only the admission and institution, and for this the certificate was challenged, & *non allocatur*, because by admission and institution the church is immediately full and provided for &c. if it be not in the case of the king. Which see ruled in *Libro Intrationum* where plenarty for six months was pleaded fol. 132. And 22. *H.* 6. fol. 31. [26. b. 27.] And in *Novo Libro Intrationum*, fol. 457. [475.]

In certifying plenarty (except where the king claims) the bishop need not say that the clerk was inducted, for against a subject the church is full by admission and institution.

2.11. *H.* 4. 17. a. 9. a. 44.
E. 3. 3. b. 32. *H.* 6. 28. b.
Dy. 221. b. 277. a. 348. a.
360. 17. *H.* 7. Cro. 43.
7. Co. 26. 22. *H.* 8. Kelw.
88. F. N. B. 34. a. 9. 12.

33. *H.* 6. 3. 1. 27. 24. 26. *H.* 8. 3. a. 21. E. 4. 34. b. Plow. 528. 6. Co. 4. 79. a. 2. Rol. Ab. 349. 591. 6. Co. 49.
[3. Black. Com. 243. Wood's Inst. 20. 256. 3. Salk. 195. 2. Wils. 174.]

Michaelmas Term, 4. & 5. Queen Elizabeth.

A scire facies does not lie in *C. B.* on the transcript of a recognizance taken in chancery.

Br. Record. 40. F. N. B. 201. Dy. 11. b. 369. 39. H. 6. 4. a. [2. Saund. 27.]

(1) **T**HE transcript of a recognizance with a condition for the payment of money to another, recognizee in chancery, came to the Judges of the Bench this Term, to be sued on there; and it was not allowed there to have any *scire facies* upon it.

Hall against Kirby.

Release of all actions, suits, quarrels, and trespasses is no bar to an action for a covenant broken after the release gives.

Tria. 4. Eliz. Rot. 1207. according to Benl. fo. 128.

Mo. 34. } S. C.
1. And. 8. }

Filmer's Novel Liver Distr', 116. 2. E. 4. 2. Co. Lit. 285. 291, 292. 14. H. 6. 11. a. 2. Mar. 112. b. 35. H. 8. 50. 56. 1. Co. 102. b. 8. 151. b. 10. 51. b. 5. 71. Br. Release, 87. Yelv. 156. Godb. 166. 435. Plow. 484. Poph. 136. Litt. Rep. 86.

[Set the Books cited in 4. Bac. Ab. 286, 287. particularly Cro. Jac. 170. And see Gouldsb. 166. 5. Com. Dig. tit. Release, E.]

5. E. 4. 4. b. 2. E. 4. 484. a. 19. H. 6. 41. b. Litt. 177. 2. Inst. 285. a.

(2) **A** MAN covenants by indenture that he will do no act during his life to disinherit his eldest son of his lands: and before any breach the covenantee releases to the covenantor *all and all manner of actions personal, suits, quarrels, debts, executions, and trespasses, from whatsoever reason or cause, from the beginning of the world &c.* and afterwards the covenant is broken, for which an action of covenant is brought, and this release pleaded in bar. *Quare.* And the opinion of the Court was, that it is not barred by any of the words above. And by *Bracton, lib. primo, cap. 16.* [lib. 3. cap. 1. fol. 98. b.] *actio est jus prosequendi in iudicio quod alicui debetur, et quod nascitur ex maleficio vel quod provenit ex delicto vel injuria.* And see *Long Quinto Ed. 4. fol. 40.* such a release as above of *all actions personal* was not a bar in annuity for a term of years by deed, to discharge the arrears due afterwards, ruled upon good consideration. And in the case above, if any term will serve, it is the word *quarrels*, and this is a cause of action by *PRISOR*, 36. H. 6. fol. 12. [11. b.] and judgment was given for the plaintiff, and damages at two hundred and seventy pounds, which see in a writ for the damages of the clerks *postea*, fol.

* Fortescue against Strode.

T. 3. Reg. nunc,
Rot. 960.

(3) "THE condition &c. That where *Fortescue* the playntiffe stood bounden to *Strode* the defendant by a former obligation to perform the covenants of an indenture &c. whereof one was, that *F.* should leave his inheritance and lands to descend unto his son, without making any other disposition or alteration of it, if *Strode* at all times upon a reasonable request were ready, and did and suffered to be done all things that should be thought reasonable, meet, and convenient by the learned counsel of *Fortescue* for his discharge, and release of his said bond and covenant, that then &c." which being read and heard the defendant said, that no reasonable request was made &c. and the plaintiff replied and shewed, that *Edmund Sture*, who was the learned counsel of *F.* advised a release of all actions, debts, differences, and demands between *Strode* and *Fortescue* aforesaid, and also one *W. Fortescue*, who was a stranger to the covenant; and sent it to the defendant to seal and deliver as his deed to them both jointly, which the defendant refused to do, &c. and took averment that there were not any other bonds, actions, debts, &c. between the plaintiff and defendant besides the said bond and indenture, without saying any thing of *William Fortescue* (who was also named in the release) in the averment &c. and upon this the defendant demurred in law. And by the opinion of the Court clearly, without any solemn argument, this request was unreasonable, and contrary to the words of the condition aforesaid, and the party not bound to seal the deed, although there was no action or demand between him and the said *William Fortescue*; wherefore the plaintiff was barred &c.

B. gives a bond to *A.* conditioned to release one from *A.* to him as the counsel of *A.* should advise: he advised a release of all demands against *A.* and one *W.* a stranger. This is unreasonable, and *B.* is not bound to execute it.

[Cro. Jac. 251. but see 1. Sid. 467. 1. Rol. Ab. 424, pl. 16.]

36. H. 6. 10. a.

Dy. 43. a. 41. a.

[Cro. Eliz. 682.]

Mich. 36. El. C. B. Rot. 353. Reynell v. Profler [See Vin. Ab. tit. Condition, P. a. pl. 30. in margin]. *A.* covenants upon the payment of ten pounds by *B.* to make him such security for *Blackacre* as his counsel shall advise. *B.* pays the money, and offers a deed comprehending a release of all his right in *Blackacre*, and also an acquittance of the sum of ten pounds, and requires him to seal it. *A.* refuses. COKE and GAWDY, that he is bound to seal the deed; but PUGHAM *contra*, because the acquittance which he is not bound to seal is joined in the deed with the release.

A juror fined in Banc, who at the affizes having eaten would not agree with his fellows, though or being sent back he did agree, and the verdict allowed.

Pasch. 12. & 13. H. 8. Rotulo 101.

24. 20. H. 7. 1. b. 3. a. 29. 35. H. 8. 97. b. 55. b. 1. And. 183.

24. 15. H. 7. 29. 1. 11. H. 4. 17, 18. 62, 63. 35. H. 6. Examination, 17. Dr. & St. 157, 158. 20. H. 6. 24. b. Dy. 37. b. 78. a. 477.

Plow. 520. Ante, 55. b.

[Bul. Ni. Pri. 308. 2. Hawk. P. C. 221. 12. Mod. 111. 2. Salk. 645.]

* [218. b.]

(4) *MEMORANDUM*, That in a writ of entry on the statute of *Rich. [2. anno 5. ft. 1. c. 8.] ubi ingressus non datur per legem &c.* the defendants pleaded the general issue, and at *nisi prius* the jury after their charge given returned, and said that they were all agreed except one, and he had eaten a pear and drank a draught of ale, wherefore he would not agree. And at the request of the plaintiff the jury departed together again and found for the plaintiff; and the matter above was examined by the oath of the jurors *seriatim*, and the bailiff who kept them, and found true as above; wherefore the offenders were committed, and found surety afterwards again for their fines, if &c. And FITZ-HERBERT, Justice of Assize there, gave them a day in *Banc &c.* at which day a fine of twenty shillings was assessed there; and as to the bailiff *Curia advisare vult*. And the plaintiff had his judgment to recover damages &c. See the like for fines assessed in *Banc*, *T. 9. H. 5. Rot. 133.* and in *East. 6. H. 8. Rot. 333.* * fines were assessed upon the jurors and two bailiffs for a similar misdemeanour before the Justices of assize by themselves there. *Vide pro misericordiâ*, sheriff assessed at forty pounds for disobedience to the Justices of *nisi prius* in not returning a writ of *habeas corpora juratorum* being required to return. *20. H. 6. fol. 33. [39. a. pl. 6.]*

M. 1. Job. Rot. 15. and indorsed Assize of *darrein presentment* by *Walt. Capell v. Will de Walsbam*. Verdict was given by ten, and the two others say to the contrary; and all the ten were examined for their reason wherefore they gave their verdict for *Capell*, and so the two for *Walsbam*. *Ex Lib. Magistris Noy*. Among the records of divers Terms of the 1d year of king *John*, it is thus noted in *Rot.*— Assize of *darrein presentment*, between *Robert Petit de Herpingbam* and *Peter de Aterbosco*, verdict given by eleven, and *Humbrey de Willers* contradicts the rest. *Rot. 17.* indorsed, *Ex Lib. Magistris Noy*. [2. H. H. P. C. 297. and note C.] 29. E. 3. 33. b. 41. E. 3. 31. a.

Pasch. 3. Regine nunc, Rotulo 927.

Four submit to abide an award *ita quod* it be delivered to the parties or to one of them; delivery to any one of either party, and by parcel only, is sufficient.

See the record of this case in the New Book of Entries, tit. Debe, pl. 10. fol. 126.

[Benl. 97. S. C.]

Ap. Benl. 32. S. C.

Cocks against Macclefield.

(5) *A* AND *B*. are bound to *C.* and *D.* to perform the award of *E.* arbitrator chosen &c. between the said *A.* and *B.* of the one part, and *C.* and *D.* of the other part to &c. so that the said award should be *made and given up* to the said parties, or to one of them, by the said arbitrator, before &c. In debt on this bond indorsed as above the defendant pleaded *protestando* that the said arbitrator made no award &c. for plea, that the aforesaid arbitrator did not deliver in

in writing any award between the aforesaid *A.* and *B.* and the aforesaid *C.* and *D.* to the aforesaid *A.* and *B.* or either of them, of and upon the premises, according to the form and effect of the indorsement &c. not denying but that the award was delivered by parol, and not denying that the award was delivered to *C.* and *D.* for if it was delivered to either of the parties to the award, although it be not to both, or to one of each party, it suffices; and so it was adjudged by WESTON, A. BROWNE, and DYER, *Justices.*

[See 3. Vin. Ab. 126. pl. 13. & notes.]
Dy. 243. b. 8. Co. 92. b. 2. R. 3. 16. 8. E. 4. 1. a. 12. b. 1. H. 7. 5. a. Coke, 5. 103. a. b. [1. Com. Dig. 383. & 394. 1. Bac. Ab. 143, 149.]

Thomas against Popham.

Palch Ult. Ro. 814.

(6) A MAN seised of land in fee by deed indented dated the 4th day of *October* in the 4th and 5th year of *P. & M.* for two hundred pounds bargained and sold it in fee: and afterwards, on the octave of *Saint Michael*, which was on the 9th day of the same month, he bargained and sold it by fine levied in the Bench to another in fee: and afterwards, to wit, on the 21st day of *March* then next following (which was the last day of six months reckoning 28 days to the month, and not reckoning the said day of the date of the indenture for one of them), the indenture was inrolled in chancery. And it was demurred in law which of these bargains should be preferred. And by the opinion of the Court without argument, the first bargain shall take place, and not the second, because by the first bargain the use was changed at common law, before the statute of Inrollments in the 27th year of *H. 8. c. 16.* and by the statute of *Wills and Uses* made in the same year, c. 10. the possession had been vested accordingly, if the statute of Inrollments had not been made to restrain this, which is under condition, *s. except the same bargain and sale be made by indenture sealed and inrolled in &c. within six months next after the date of the same indenture*, and this was performed in the case above accordingly; for all * the whole day of the 4th *October* above shall be accounted in law the date of the indenture, and any part of the said 21st day of *March*, which was the last day of the

The time for inrolment of deeds of bargain and sale under 27. H. 8. c. 16. is exclusive of the day of the date; and any instant of the last day of six lunar months shall be said within the six months.
4. Leon. 4. pl. 18. S. C. Pasch. 4. El. Rot. 811. Com. Banc. Novel Liver Entr. 596. S. C. Mo. 40. S. C.
Co. Lit. 46. 674. Dal. in Keilw. 205. a. 2. Inst. 674. Coke, 4. 71. a. 5. 1. b. Kelw. 88. 6. Co. 61. Dy. 245. 286. a. [Cro Eliz. 345.]
6. E. 6. 422. Dal. pl. 6. 6. E. 6. Br. Faits Enroll. 9. B. N. C. 422.

5. Co. 1. Mo. 876. 7. H. 7. 5. b. 40. E. 3. 18. b. 17. Aff. 21.

* [219. a]

[Powelson Powelson, 505, &c. Comp. 218. Dougl. 463. 3. Term Rep. 623. 1. Hen. Black. 13.]

Mich. 6. Jac. B. R. Barker v. Finch [Godb. 156. 1. Danv. Ab. 696. pl. 1. note (e)]. The lessee was compellable by the bargainor to pay it [s. the rent] before the deed was inrolled, and there were laches in the bargainor that he did not inroll it sooner.

months, shall be said within six months: but this was a narrow pinch in the case (a).

See the second Lecture of *Popbam*, his sixth division, he says it was adjudged in this case, he shall avow for the † intermediate time.

† Orig. *les termes incurres mesmes.*

(a) The indorsement on the back of the deed of bargain and sale is always received as sufficient evidence of its inrollment. *Kinnerly v. Orpe*, Dougl. 57. And by 10. Ann c. 18. § 3. if a bargain and sale inrolled be pleaded with a *proffert*, a copy examined and proved on oath, signed by the proper officer, shall be of the same effect as the original.

(7) IT was moved by *Welsh*, Whether the statute of 32. H. 8. c. 33. intituled, *that wrongful disseisin is no descent in law*, ought to be intended of disseisins made by force or violence only, or not, because the preamble speaks of entries by strength, &c. and such disseisor, and so dying seised, mentioned in the purview of the act, as *DALISON*, Justice, in his Lecture at *Gray's Inn* upon this statute understood, as was said by *GEFFREYS*. And by the opinion of the Judges in *Serjeants Inn* on a diligent review of the statute, it ought to be intended of every disseisin, as well simple, as by force.

East. last. Roll 1022.

Devise that executors shall sell with the assent of *A.* if *A.* die before assent, the power of the executors is determined. Co. Ent. 601. [and Dal. 45. pl. 36.] S. C. 1. E. 6. 2. Dy. 210. a. 30. H. 8. B. 134. Mo. 62. Jo. 352. 49. E. 3. 16. b. 19. H. 6. 25. a. 22. El. 371. b. See 19. H. 8. 95. a. 2. El. 177. a. Perk. 550. Gould. 2. 1. Inst. 112. b. [See Co. Lit. 113. a. Mr. Hargrave's note (2). 2. P. W. 308. Cowp. 464. Powelson Devise, 292—306. 1. Bac. Ab. 200. &c.]

Danne against Annas and Johnson.

(8) A MAN devised his lands to his wife for the term of her life, remainder to *K.* his daughter in tail, and if she died without issue, that then, after the death of his wife, the land should be sold for the best price by his executors together with the assent of *A. B.* and made his wife and a stranger his executors, and died; the wife entered, and died; and *A. B.* died, and the executor who survived sold the land alone: the question was, Whether it is a good sale, or not. And by the opinion of the Court it is not good, for want of sufficient authority.

East. 28. El. C.B. [1. And. 145. pl. 193.] A man devised that his executors should sell; one died, and the others cannot sell by the opinion of *ANDERSON*, *WINDHAM*, and *RHODES*. But *GAWDY*, *Serjeant*, urged the case above. *COKE*, *Attorney General*, put the Case of *Vincent and Leigh* in *B. R.* 25. El. [*Cro. Eliz.* 26. 1. Leon. 285.] One having two sons and four sons-in-law devised to the youngest son in tail, and if he died without issue that his sons-in-law should sell. One of the sons-in-law died, afterwards the devisee died without issue, and adjudged that the sons-in-law who survive shall sell, for the words are satisfied, and cannot be intended that all shall survive the estate tail.

Parry against Smith.

(9) **A**TTAINT in *London* upon a verdict given there before the mayor in an action of debt brought by *Parry*, clerk, Chancellor of *Salisbury*, against *Smith*, upon a recognizance taken before the Mayor, in which *Smith* was bound as surety for one *Whalley* who lately inhabited a tenement of *Parry's* situate in *Abchurch-lane London*, called the *Lambe*, for which suit and contention was between one *Ok*y and *Parry*, and the possession decreed in the chancery to *Parry*: and because he mistrusted *Whalley* to be more affected to *Ok*y to have him for his landlord than *Parry*, *Parry* procured the said recognizance, the condition of which was, "That if the within bounden *William Whalley* do well and honestly behave himself towards the said *Henry Parry* so long as the said *W.* do remain or dwell in an house or tenement in *Abchurch-lane* called the *Lambe*, and keep the possession of the same for and to the use of the said *Henry* as very tenant to the said *Henry*; and that if the said *W.* do depart out of the same tenement, and dwell in any other place, * then to deliver the key and quiet possession of the same to Master *W. Harper*, Lord Mayor of the city of *London*, to the use of the said *Henry*; and at all times hereafter do depart and go from the same tenement within fourteen days after warning given at the said tenement by the said *Henry* or his assigns, that then &c." (10) And he pleaded that on such a day and year he departed from the said house, and came to the house of the said Mayor in *Lombard-street* on the same day, and there delivered to him the key and quiet possession of the said house to the use of *Parry* &c. And this was traversed and found against the said *Parry* who was the plaintiff, and upon this verdict he now brought the attaint; and the general issue was pleaded. And upon the evidence it appeared that the key was delivered to the Mayor according to the condition; and also that the house was seen empty and vacant at the time of the departure from it, and all the doors locked; and yet within an hour after, *Ok*y entered into the house by a shop door with a key which he had kept privily a long time. And whether the evidence above was good and sufficient to attain the jury was much debated; and it was holden by A. BROWNE and DYER good enough, and that by no possibility the quiet possession could be

Trin. 4. El. Rot. 1038.

Recognizance conditioned to deliver the keys of a house and quiet possession to A. The keys are delivered the house being empty, and the doors locked, but within an hour afterwards another person enters by a key which he had long kept; this seems not to be a good performance.

Co. Ent. 81. b. S. C.

1. Ro. Ab. 600.

[Vin. Ab. Condition. S. a. pl. 6. T. a. pl. 3.]

* [219. b.]

Br. Feoffinents, 33.
Ante, 18.
3. Cro. 309.

delivered to the Mayor in form aforesaid, but that the plaintiff either personally or by deputy ought to have come to the house in *Abchurch-lane*, and there to have received the possession, &c. But WESTON *à contra* clearly. And the grand jury affirmed the first verdict, contrary to the expectation of many by-standers, and the opinions of the other Judges.

GUILDHALL; LONDON.

In debt on a contract for twenty pounds defendant may give in evidence under the general issue, that it was only for twenty marks.

[See Mo. 49. pl. 148. and Dal. 49. S. C. but much varying from Dyer.]

Allein, 29. 9. H. 7. 3. a.
3. H. 6. 4. b. 2. Ro.
Abr. 702. Ley, Gager,
93. 22. H. 6. 44. 17.
H. 7. 20. 40. Dy. 115.
32. b. 222. b.

9. H. 6. 67. 43. E. 3.
5.

Bladwell *against* Sleggein.

(11) **I**N DEBT the plaintiff declared upon a sale of certain woods for twenty pounds, and the defendant pleaded *nil debet per patriam*. And upon evidence it appeared that the bargain was only twenty marks. The jury (by the opinion of CATLYN, Chief Justice, and A. BROWNE) shall be bound to give a verdict for the defendant in this case as well as when the variance of the contract is of things sold, according to 21. E. 4. [22. a. pl. 2.] because it cannot be intended the same contract (a). *Quære* whether there be not some difference, because the plea is, he doth not owe the sum or any part thereof in form as &c. whence in detinue 22. E. 4. [2. a. pl. 8.] of a chain containing three ounces, and in truth it contained only two, the defendant may safely wage his law; otherwise is it if the variance be only in the price or value.

In the exchequer, 3. Car. & Walton and Boat's Case in *assumpsit* for eleven pounds, the plaintiff counted for divers sums of money lent at several times; the jury found that it was a debt of only ten pounds: yet he had judgment and shall be barred for the residue, for it is for divers things: it is otherwise where there was one entire contract.

10. Eliz. & Billingsley brought an action upon an *assumpsit* to pay twelve pounds. The jury found a promise to pay seven pounds. Judgment reversed because it is not the same *assumpsit*. Inst. 282. a. Hob. 72, 73.

(a) In all cases upon special contracts it is necessary to set out the contract truly, and a variance in any part is fatal because the contract is entire, Bul. Ni. Pr. 171, 1. Term Rep. 240. 447. 4. Term Rep. 314. 687. Cowp. 671. 3. Term Rep. 531. tho'

in mere actions of debt it is not generally necessary for the plaintiff to recover the exact sum declared for, 2. Black. Rep. 1221. Dougl. 6. 2. Term Rep. 129. 1. Hen. Black. 249.

* Hilary Term,
5. Queen Elizabeth.

* [220. a.]

Bushe's Case.

In Cur' Ward'.

(12) A MAN seized of lands in fee-simple, and also of lands in tail, and the fee-simple land is holden in socage, and the tail land holden *in capite*, made his last will in writing; and thereby (reciting that whereas *M.* his wife had title by the law of the land to be endowed of the third part of all his lands, tenements, and hereditaments) he devised to her all and singular the third part of all his lands, tenements, and hereditaments, &c. to have the same third part to the said *M.* during her life, in full recompence of all such jointure, and dower, as she shall or may have, or claim of his said inheritance. The question was, Whether the wife shall have all of the fee-simple land, which amounted to a third part of the whole land as well tail as other, so that all the land in tail shall be to the Queen in ward, or not; or whether the will be void. And because she had entered into a third part of the fee-simple land without using her writ of dower, or without assignment, where she had her election to have the one or the other, the opinion was that she shall be barred from claiming more &c. See the like for bar of dower by the statute of 27. H. 8. [c. 10. § 6.] *postea*, fol. 218. [228. pl. 46.] and H. 8. [*Eliz. postea*] fol. [248.] & M. 9. & 10. [*Eliz. postea*] fol. 266. & M. 14. fol. 317. [*post.*]

A man seized of socage land in fee, and of land in *capite* in tail, devised the third part of all to his wife in recompence of dower, and died. She enters immediately into the third part of the fee-simple lands; this shall bar her further claim, by 27 H. 8. c. 10.

4. Co. 4.
Hob. 33.

Plow. 545. b. 38. H. 8. 61. b. 20. Aff. 16. 6. E. 6. B. 421. Br. Dower, 69. 5. Car. Cro. 171.

A devise is a good jointure within the statute 27. H. 8. as was ruled in C. B. T. 36. El. 2. [Lutw. 737. 1. Eq. Caf. Ab. 218. Co. Lit. 36. b. notes. 1. Br. Ch. Caf. 292. and the Case of Villa Real v. Ld. Galway, Addenda to the 2d vol. xv. xvi.]

Bolderow and another against Futter.

(13) A COMMON RECOVERY was suffered last Term by Bolderow and Wiseman against Futter of the manor of Bressingham in the county of Norfolk, to the use of Sir Nicholas Bacon, Keeper of the Great Seal, in which an error was discovered by Lennard, *Custos Brevium*, in this, namely, that the original writ of entry was returnable on the octave of Saint Michael, which is the 9th day of October, and the *dedimus potestatem de attornat' faciend'* for Futter bore

The *dedimus potestatem* to make attorney being tested after the return of the writ of entry in a common recovery, is error, for the judgment hath relation to that return.

5. Co. 45. b. 2. Keb. 627. 1. Keb. 717.

4. H. 6. 16. 2. H. 4. 23. The judgment hath relation to the day of the return. 10. El. 270. pl. 21. 22. E. 4. 10. & 39. 20. El. 361. 10. H. 6. 4.

* [220. b.]
[Cruise on Recoveries, 109, 110, 111, 138. 1. Hen. Bl. 73.]

33, 34, 35. H. 6. 49. 2. 511. a. 20. E. 3. Judgment, 178. by Wilby, Finch, fol. 54. 1. Ro. Ab. 290. (1.) 6.

Tr. 41. El. Return of the writ of covenant was before the date, and holden error not amendable. Mo. Rep. f. 111. a. Gage v. Sawyer. But Co. l. 5. 45. b. it is amendable. [Mo. 571. says, that this judgment was reversed, and it was holden not amendable.]
[Cruise on Fines, 130, 131.]

date the 11th day of *October*, and the *mittinus* of it into the Bench bore date the 30th day of *October*, which was after the relation of the judgment, which is on the octave of *Saint Michael*, although the entry is, that *afterwards in this same Term the demandant cometh, and the tenant though solemnly called cometh not, but maketh default, therefore &c.* For so it should be, although the writ were returnable the last day of the Term; for the * "*afterwards in this same Term*" may be the same day that the count and defence are made; and then in the case above, the warrant of attorney was made after judgment given, contrary to the supposal of the writ of *dedimus potestatem*, which is, "*whereas our writ pendeth before our Justices &c.*" because a writ is not pending after judgment given. And so the recovery above was holden erroneous *per Curiam*.

Easter Term, 5. Queen Elizabeth.

Sir Nicholas Bacon's Case.

A recognizance to three, before one of whom it is taken, is void as to him, but good for the others. 45. Aff. 3. 8. Co. 118. a. 9. E. 3. 24. 9. H. 6. 39. b. Diet, 188.

(14) **A** RECOGNIZANCE was made to *Sir Nicholas Bacon, Knight, Keeper of the Great Seal*, and to two others; and it was taken and recognized before the said *Nicholas*

(14) *East. 36. H. 6.* without roll, in the pleas of the remembrancer of the exchequer, that *ARDEN, Chief Baron.* directed a counsel to another baron of the exchequer, under the *teste* of his own name, to take a recognizance of one *Talboys* to the said *Chief Baron*, and one *Tanfield*: upon which one *Hitchcock* of *Lincoln's Inn, Lecturer* in 3. *Jac.* 1605, upon the stat. 31. E. 3. c. 9. founded one of his cases.

35. *El. B. R. Holland and Franklin* [1. Leon. 184.]. If the recognizance had been taken generally in the chancery of our lady the queen before the queen herself, as other recognizances are, it would be good, unless it were especially averred that nobody was present in court, except he himself to whom the recognizance &c. *per Curiam*.

Mich. 41, 42. El. In the argument of the case of *Erish and Rewes* [Cro. El. 717.] that a recognizance to *B.* to the use of the Judge before whom it is acknowledged is good, and the other Judges agreed.

H. 12. Ric. 2. B. R. Rot. 33. The city of *Sbrensbury* has cognizance of pleas, and to levy fines before the bailiffs of the said city, and that at all times there have been two bailiffs, and that *Will. Withford*, constable at the time of the levying, was one of the bailiffs before whom &c. and so party and judge &c. Error allowed accordingly.

Nicholas B. Knight, Keeper of the Great Seal. Whether this be good or not, was demanded of the Justices. And it was holden by their opinion, that as to *Sir Nicholas Bacon* it was void, and to the other two it was good enough.

12. Co. 124. 5. Co. 39.
8. 11. 12. H. 6. 19. 49.
2. b. Finch, 4. 6. 8.
H. 6. 21. a. Br. 511.
2. Inst. 511.
[14. Vin. Ab. 303. 2.
Bac. Ab. 330.]

Hil. 4. H. 4. Rot. 39. Wilchford and Wiggan, ex Lib. Mri. Noy.—Hil. 4. Jac. B. R. Brett and Rawley [2. Rol. Ab. 93. pl. 14. and see 14. Vin. Ab. 574. pl. 14.]. *Brett of Newcastle* commenced a suit in the court, and afterwards is made Judge of the court of the town, and good, because he was not the sole Judge, for the court was holden before *BRETT. Mayor, E. and F. Bailiffs, and G. Recorder*, and so it is their act, by *BARSDALE, Leister*, [1. Salk. 398. Cruise on Fines, 75.]

Warnecombe against Carell.

(15) **MEMORANDUM**, That in the last Vacation *Edward Carell* procured a fine of the inheritance of his wife, who was the heiress of *Warnecombe* in the county of *Hereford*, when his wife was only of the age of nineteen years; by which fine the land was conveyed to him and his wife in tail, remainder to the right heirs of the wife. And the cognizance was taken by *dedimus potestatem*, directed to *Sir Thomas Saunders, Knight*, and to one *Chifnal of Gray's Inn*. And the writ was signed by *SERGEANT CARUS*, because the land was within his circuit, according to the new order. And yet *Carell* and his wife were here in the city of *London* all the *Lent*, and she sick: and divers Justices were here also, who could well have examined the wife. And in *Easter* week the wife died, but the Queen's silver was entered of the last Term four days before the death, which was on *Friday* in *Easter* week, but yet the fine was not ingrossed then until the *Wednesday* following. And the original * writ of covenant bore *teste* the 15th day of *January* last, returnable on the morrow of the *Purification*, and the *dedimus potestatem* on the 18th day accordingly. And now, on the first day of this Term, the Court was moved at the suit of *Warnecombe* (uncle to the wife) to stay the recording and engrossing, and delivery of the fine; but because the queen's silver was entered, and also the fine ingrossed, before the beginning of this Term, although the course of the fine be in such case, *this is the final concord made in the court &c. on the morrow of the Purification, and afterwards granted and recorded in fifteen days of Easter &c.* the opinion of all the Judges was, that the Court ought not to stay the delivery;

The Court will not stay the passing and ingrossing of a fine after the king's silver is entered, though it were levied by an infant, *scilicet covert*, who is since dead.

[12. Co. 124. S. C.]
[Dal. 56. pl. 32. S. C.]
Turner, 144. pl. 47.
Hob. 330.
Hutton, 135.
West's Precedents
Fines, fol. 5. sect. 17.

Co. Mag. Chart. 511.
Dy. 89. b. 258.
33. H. 6. 52. b. 8. El.
246. a. 5. Co. 39. Br.
Fines, 85. 1. H. 7. 9. a.

* [22 I. a.]

Hutt. 135.

5. E. 3. 15. 33.
[*Cruise on Fines* from
47. to 50. and 294.
Cro. Eliz. 468*.]

Dy. 227. a. 234. a.

Crompt'. Courts, 31. a. 92. b.

but it seemed the contrary to me, namely, that by the discretion of the Court, when the manner of the subtle and undue means in the circumstances and ordering of this fine is perceived by the Court, they may well stay the ingrossing and delivery of it for a Term or more. See more of this case, fol. 246. b. [a, pl. 68.]

SURREY.

Tenant in tail makes a feoffment to himself in fee, and afterwards devises to A. in fee, and dies seised, yet his heir is not remitted.

Jenk. Cent. 5. c. 92. S. C. Plow. 246. 4. E. 2. Mortdancestor, 39. 4. M. Br. Remitter, 52. 19. H. 6. 59. 31. 40. Aff. 33. 2. Dy. 177. 366. a. 24. 44. 49. E. 3. 42. 26. 17. and 27. 27. 34. H. 8. 28. 54. 2. 22. Aff. 78. 4. M. B. 482. 31. H. 8. 15. b. 49. E. 3. 3. [Hob. 254, &c. Co. Lit. 347. 348. 3. Bl. Com. 19, &c.]

Bishoppe against Bishoppe.

(16) **I**N attaint, *Bishoppe* against *Bishoppe*, it was holden by the opinion of WELSHE, WESTON, and DYER, that if tenant in tail make a feoffment in fee to the use of himself and his heirs, and afterwards make his last will in writing, and thereby devise the land to his wife in fee, and die, his son shall not be remitted to the intail, because no freehold has descended to him by reason of the devise. And this was afterwards affirmed by CATLYN, SAUNDERS, *Chief Baron*, BROWNE, and WHYDDON, at dinner. And yet there is a dying seised in the father of a fee-simple, but the devise cut off the descent,

HERTFORD.

In *warrantia chartæ*, if the lands lie in two counties plaintiff must suppose in his count that he is impleaded in each,

Warrantia chartæ does not lie where the warranty is only against the feoffor and his heirs, unless *dedi et concessi* be in the charter.

[Dal. 48. pl. 8. S. C.]

7. Co. 3. 22. H. 6. 5. 39. E. 3. 26. Garr. 11. 29. 40. 43. E. 3. 3. 7. 20. Co. Lit. 6. a. 1. 4. Co. 2. 80. 2. 6. 15. H. 7. 8. 2. 10. 31. E. 1. Vouch. 240. Perk. 124. 6. E. 2. Vouch. 258. 23. Aff. 39. Co. Lit. 275. Fit. N. B. 134, 135. [See the notes and margin of the last edit. of Cro. Eliz. 602.]

(17) **A** WARRANTIA CHARTÆ was brought by ——— against ——— in the county aforesaid, and the land which was warranted lay in the counties of *Hertford* and *Bedford*. And the plaintiff supposed in the count that he was impleaded by affize before R. CATLYN and A. BROWNE, who were Justices of affize in the county of *Bedford*, but not in the county of *Hertford*. And for this it was holden by the Court that it is not good. And also the warranty was only against the warrantor and his heirs; and therefore clearly *per Curiam*, the writ does not lie, if there are not the words *dedi et concessi* in the deed.

The warranty in law by *dedi*, or by reason of the reversion, is not destroyed by express warranty, as it appears here, and 20. E. 3. Fitz. Countr. de Garranty, 7. and Coke upon Littleton, 384. a.

MIDDLE.

Trin. Ult. Rot. 86a.

Before induction the prebendary cannot charge his church lands.

If a man plead his deed, *dat. d. 20. Jan. and delivered 30.* he ought to say, "first delivered on the 30th," or it shall be taken a perfect deed on the 20th.In Annuity, plaintiff counting on a scisin is *his demesne as of freehold* has elected to have it as a rent-charge.

4 Co. 79. 1. Ro. Abr. 481. Plow. 528. [S. P. exactly, which see, and the books cited in the margin.]

4 H. 8. 1. b. 32. 33. H. 6. 28. b. 24. b. 8. H. 5. 9. b. N. B. 36. 2. 11. 12. H. 4. 17. 9. 12. a. Quare impedit, 162.

8. H. 6. 23.

8. Jac. Cro. 264.

Bro. Departure, 20.

Dy. 167. b. 227. a.

[3. Bac. Ab. 694. Shep. Touch. 56.]

3. E. 6. 65. a. Dy. 140. a. 22. H. 6. 12. a. 2. R. 3. 5. a.

[Cro. Car. 170, 171. Co. Lit. 17. b. Mr. Harg. note (4). 2. Wilk. 224.]

For before induction it is not properly a tenement in law.

Quare impedit, 125. 35. E. 3. 4. 21. E. 4. 34. 19. H. 6. 21. Dy. 217. b.

[2. Black. Com. 312.]

* (18) **I**N a writ of annuity against the successor of a Prebendary of *Litchfield* upon the grant of his predecessor, confirmed by the ordinary, who was also patron, and by the Dean and Chapter; the issue was, whether the grantor was prebendary at the time of the grant, or not. And upon evidence given to the jury it appeared that the grant was made after the collation, admission, and institution, and before the instalment or induction: upon which it was demurred in law: and it was argued the next *Trinity Term* at the Bar and Bench; and holden by WELSHE, WESTON, and DYER, that he shall not be said to be Prebendary to all intents, nor to the common law and people of the realm without the real possession, which is by induction, by which act public notice is given to the parish that he is their lawful and rightful pastor &c. And for this divers cases were vouched &c. 41. [E. 3. 5. b. pl. 13.], and 45. E. 3. [Fitz. Ab. Tit. Exchange, 10.] 11. H. 4. [9. a.] & 24. H. 6. 1. H. 5. [1. pl. 2.] in the spoliation: but BROWNE *à contra, totis viribus*. (19) Also it seems by DYER, that the count is defective and faulty, namely in these words, *s. by* his writing bearing date the 20th day of *January*, and delivered to the said plaintiff on the 30th day of the same month: and it does not say *first delivered as his deed &c.* so that the word "*his*" supposes a perfect deed on the 20th day of *January*, at which time he was not collated, admitted, or instituted. Also because it is alleged that the plaintiff was seised of the said annuity or rent *in his demesne as of freehold*, this proves that the plaintiff had accepted it as a rent-charge, and then the person is discharged. And by the verdict and the opinion of the Court he was not seised &c. because he was not inducted into the church of *Bacton* in the county of *Suffex*. And between *Tirrell* and *Nuttass* the count in a right of advowson proves that the clerk is not parson in fact before induction, by THORPE, *Hil.* 38. E. 3. [3. b. 4. a.] Also the parson of a church is never said to be *imparsonée* before induction, nor has *jus in re* but *ad rem* before induction.

H. 21. Jac. Rot. 1164. *Evans* and *Kiffin's* case [Noy, 93. Lat. 233. Palm. 457.], and resolved, *Trin.* 3. Car. that he shall not be called Bishop before consecration, or Parson before induction.

SURREY.

Ayer against Orme.

Lease of lands in *B* by the Archbishop of York rendering rent there, *proviso* that during any vacancy of the see the rent should be paid to the chapter *ut in jure suo*. The rent being in arrear during a vacancy, the archbishop's successor's bailiff re-entered and distrained therein, and avowed damage feasant. This entry was holden unlawful, because,

* [222. a.]

1st, This *proviso* is not a condition (a). 2d, Rent cannot be paid to the chapter who have not the reversion. 3d, *In jure suo* is contrary to the king's right to the temporalities *sede vacante*. 4th, Bailiff cannot re-enter for a condition broken without express authority. 5th, The avowry did not shew the distress to be subsequent to the re-entry, and so is bad. 6th, *Quere*, whether payment should be made at *B*. or at York. 7th, *Qu.* Whether a demand should have been made. 8th, *Qu.* If it were a condition, would not the lease be *ipso facto* determined by the breach of it.

[Dal. 53, and Benl. 129. §. C.]

1. And. 9. } S. C.
Mo. 51.

Turner's Rep. 74. this case well argued, 143. pl. 46.

East. 4. El. Rot. 460. it was adjudged for the

(20) A LEASE by indenture was made by one *Lee*, late Archbishop of York, and confirmed by the Dean and Chapter, of lands in *Battersey*. And by the indenture a rent of twenty-four pounds fourteen shillings and three-pence was reserved to him and his successors to be paid at *Battersey*, at the Feast of the *Annunciation of the blessed Mary*, and *Saint Michael*, by equal portions, "*provided always*, that in the time of the vacancy of the archbishoprick aforesaid, the aforesaid rent, for and according to the rate of the time of the vacancy, should be paid to the Chapter of the cathedral church of York as in their own right during every time of such vacancy." And afterwards * the see became vacant on the 5th day of *July*, in the first year of the now Queen, by the deprivation of *D. Heath* for the refusal of the oath of supremacy contained in the act of the first of the now Queen, and remained vacant until the 25th day of *February* in the third year of the now Queen, on which day the Archbishop that now is, was created. And because the said rent for half a year at the Feast of the *Annunciation* in the second year was not paid to the Chapter, the Archbishop that now is, had re-entered; but the pleading is, "*that Orme the defendant, as the bailiff of the said Archbishop, upon the possession of the said John Hill entered, and him thereout expelled and removed as it was lawful for him to do, and this &c.*" and no demand or request of the rent by the Chapter was alleged. And the opinion of all the four Justices upon long debate was for the plaintiff, and that the entry for the condition broken was not lawful. And first, by the opinion of *WELSH, BROWNE, and DYER*, the *proviso* placed as above is not a condition, but an exception or saving in the sentence of the reservation of the rent, and as an agreement or covenant: for it is not annexed to the estate, nor to the thing

(20) And this was a void *proviso*, because the rent is not reserved to the dean and chapter; void also, because it is contrary to the reservation; void also, because the rent is to be paid according to the rate of time which by law ought not to be apportioned, for it is not due until the Feast &c. And this *proviso* is not a condition, but a limitation or demonstration, and this *proviso* cannot take the title to the rent from the queen in the time of the vacancy of the said archbishoprick. Benlows, fol. 130. cap. 191.

(a) Note, Bendloe, 129. and Anderson, 9. agree with Dyer; but Moor, 51. reports this first point as determined the other way.

And in Dalison's report of it, page 53. the Court seem divided.

granted &c. But it is like the case of a warranty, *proviso* that he will not vouch, 7. H. 6. [43. b. pl. 21.] and 9. H. 6. [35. a. pl. 6.] without impeachment of waste, *proviso* that he shall not commit waste wilfully in the houses &c. And *Littleton* [sect. 220.] in grant of a rent-charge, *proviso* that it shall not extend to charge the person &c. (21) Also there were two subsequent impossibilities, that is to say, one that the rent aforesaid could not be paid, because the Chapter have not the reversion. Also, ("as in their own right") is impossible, for the Queen only has a right to it, the fee being vacant. Also a Chapter by some is not capable of receiving the rent, because it is a body politic and imperfect; but all did not agree to this. Also whether payment ought to be made to the Chapter at *Battersey*, or at *York* &c. And it seems that if it be in the nature of rent then it shall be paid at *Battersey*, and this upon the land, and not in any other place of that town, although the Bishop has a great house there &c. Also whether it is payable without request or demand was moved; and in this the Judges differed. Also because this condition arises upon a rent to be paid neither to the lessor nor to his successor, nor the condition broken in the time of the one or of the other, it was holden by *WESTON* and *BROWNE* that the successor cannot enter, but the condition broken determines the lease *ipso facto*, without any words of re-entry, and without re-entry in fact; according to the opinion of *FITZHERBERT* in the case of *Dockwra*, 27. H. 8. [15. a. b.]; then the successor may well take advantage of the condition &c. *ideo quare inde*; for divers hold this opinion of *FITZHERBERT* not law, although it be only a lease for a term of years, but if it was freehold* clearly it should not cease without re-entry made. Also it was holden by all that a bailiff by reason of his office cannot enter for his master for a condition broken without his express command to do it. And although it is not ex-

plaintiff. See Harper's Rep. fol. 1. a. 2, 3. Co. 72. 64. b.

[Shep. Touch. 119, 120. Co. Lit. 203. b. Mr. Butler's notes.]

[Shep. Touch. 128, 129.]

21. E. 4. 41. Dy. 68. 14. El. 311. b. 35. H. a. Br. Condition, 195. Dy. 318. Novel Liver Entire 256. Dy. 152.

[4. Com. Dig. 440, 441.]

1. Leon. 128. 3. Cro. 385. 1. Ro. Rep. 69. Wast. 39. Perk. 142. 28. H. 8. 13. b. 27. H. 8. 17. Mo. 45. 1. Inst. 203. b. Litt. 48. 2. Coke, 2. 72. a. 1. Inst. 206. b. 213. a. Plow. 135. 2. Keb. 737. 1. E. 5. 5. 12. E. 4. 10. 4.

[3. Bac. Ab. 396.]

[5. Com. Dig. 430, 431.]

[Ld. Raym. 750. Dougl. 486.]

[4. Bac. Ab. Rem. 1.]

Dy. 102. 1. Inst. 201. b. Plow. 70. b. 4. Co. 73. a. Dy. 51. 68. a. 88. 348. Litt. sect. 350. 28. H. 8. 7. 11. 21. H. 7. 17. a. 12. Plow. 135. 413. 3. Co. 21. 65. 11. H. 7. 22. a. Br. Condition, 63.

[Co. Lit. 214.]

* [222. b.] Dy. 127. b.

[See note (a) to 102. b. pl. 83. ante. Mo. 52. but see Str. 1128.]

(10) *BROWNE*, *Justice*, in the argument of this case [Dal. 55.] says, that the word *proviso* is taken in five manners. 1. For a condition as lessee for years, *proviso* that the lessee shall not alienate. 2. It is taken for a limitation, and it is joined with these words, *but*, or *not*, as a lease for years, *proviso* that if the lessee die within the term the lease shall cease: or a lease for years to two, *proviso* that if one die within the term the other shall have it for only two years afterwards. 3. *Proviso* is taken for an exception, as a lease of a manor, *proviso* that he shall not take a certain acre to his messuage. 4. It is a prohibition, as a writ to the coroners, *proviso* that B. one of the coroners, do not intermeddle. 5. It is as a covenant; as if a man lease a house, and the lessee covenant to repair it, *proviso* that the lessor pay the charges of the carriage of the timber, this is a covenant, because it is divided from the principal thing leased. *DYER* agreed to this division.

Lit. Rep. 35. 71. 42. pressed by whom the rent shall be paid to the Chapter, this
 E. 3. 6. b. 13. H. 7. ought to be intended by the tenant &c. and this by all. But
 17. b. 17. Aff. 20. the bailiff had not alleged the time of his re-entry for his
 10. H. 7. 12. a. 3. Cro. matter, and it may be intended that this was after the distress
 698. Noy, 38. 41. taken; and then it is not good, for the estate of the plaintiff
 E. 3. 26. 2. 8. E. 4. is not defeated till the entry be made. And this ought to
 4. b. 13. 11. 12. 21. have been shewn to be before the time at which the taking
 H. 7. 17. 28. 12. 19. was made &c.
 E. 2. Dett. 176. 3. H. 4. 13. 27. Aff. 5. 19.
 E. 3. Feoffments, 58. 2. R. 3. 14. 5. 6. Co.
 76. a. 69. Plow. 135. 3. Co. 64. b. Br. Bayliffe, 3. Br. Obligation, 46. 14. H. 8. 18. Dy. 7. a. 102. 374. 14. Aff. 10. 11.
 28. 22. E. 4. 25. 13. Plow. 133.

Though a bond debt to be paid at a certain time and place be discharged by acceptance before the day, and at another place; yet this evidence will not support a general plea of payment according to the condition.

[Dal. 48. S. C.]

Mo 47. S. C.

46. E. 3. 5. b. 21. H. 6. 25.

9. H. 7. 17. 27. H. 8. 11.

9. E. 4. 22. Br. Condition

136. Plow. 291. Perk.

748. Dy. 150. 1. Inst.

212. b. Ow. 45.

2. Cro. 435. } cont.

3. Cro. 142. }

10. Co. 127. Co. 24. Dy.

53. 219.

(22) *MEMORANDUM*, That it was holden at *nisi prius* in *Guidhall, London*, that if a man be bound by covenant, or the condition of a bond, to pay a sum of money at such a Feast and place, between certain hours of the Feast, and before the Feast at another place he pay the money to the obligee, and he make acquittance of it also; although by that, it is a discharge of the covenant, or condition by the acceptance &c. yet if he plead the payment precisely to have been made at the Feast, place, and within the hours according to the indenture or condition, and upon that the party join issue with him, the jury are not bound upon such evidence to find the payment according to the issue, for the truth is contrary. And this by the opinion of DYER, BROWNE, and WELSHE, *Justices*, against the opinion of SERJEANT HARPER (a).

(22) *Tr. 9. Eliz.* Condition of the bond was, *If the obligor shall pay ten pounds in the hour after the obligee hath enfeoffed him of a mill &c.* he payed five pounds before and five pounds after, this is a forfeiture, for the money is not due until &c. And if he paid five pounds before, it cannot be intended the same sum. It is otherwise where the day is limited, for there it is a duty.

Micb. 30. 31. Eliz. C. B. Bond v. Richardson, [Mo. 267. 1. And. 198. Sav. 96.] Rot. 610. Debt on bond, the defendant pleads payment at the day, the jury find payment before, judgment for defendant, because payment before is payment for ever.

(a) It was formerly a matter of much doubt whether in this case the defendant ought to plead specially or not. But now by 4. Ann. c. 16. §. 12. if the obligor have before action brought, paid the principal and

interest due, such payment shall and may be pleaded in bar, though not strictly made according to the condition. See also 2. Burr. 944. 2. Wils. 173. Bul. Ni. Pr. 171.

Proctor's Case.

YORK.

(23) ONE *Proctor* yeoman was outlawed by process in a writ of detinue of three boxes and one bag, with charters, writings, and other muniments in the said boxes and bag contained, at the suit of one *Lambert* at a county court holden on the 19th day of *October* last; and the *exigent* was returnable on the morrow of *All Souls*, at which day the undersheriff did not return the outlawry, but he returned that the defendant on the aforesaid 19th day, which was the 5th county court, appeared and produced a writ of *superfedeas quia improvidè*, because the defendant had appeared by *Dyson* his attorney, and oftentimes offered to answer the aforesaid *Lambert* in the plea aforesaid &c. And the *teste* of the *superfedeas* was the 12th day of *October*, which was a week before the 5th county court; and in truth the *superfedeas* was then granted and delivered of record in the Bench on the same day, as appears by the roll thereof in the said court. And upon the suggestion of the plaintiff that the defendant was *quinto exactus* and outlawed as above, the ATTORNEY GENERAL * granted a *certiorari* out of his office in the Bench under the *teste* of the CHIEF JUSTICE directed to the coroners of the county of *York*, viz. to certify whether the defendant was outlawed or not, and if he was, then at whose suit, on what day, year, why, how, and in what manner, &c. And the *teste* of the writ was the 30th day of *October*, which was a week before the return of the *exigent*, and returnable without delay; to which writ the coroners returned that he was outlawed, and the record of the *exigent verbatim*; and the date of the return of the *certiorari* was the 12th day of *January* in the 5th year [of the Queen]; and by reason of this return of the coroners, the defendant was molested in his goods and body &c. wherefore he prayed remedy now in the Bench aforesaid, to be discharged of this outlawry.

(24) And the matter was well debated, first, whether process of outlawry lies in this writ above of detinue of charters &c. And it seems not, but see many books thereof in the time of *H. 6.* And then whether the return of the outlawry by the coroners be a sufficient record against the party to make him an outlaw in law, or not? And the Judges thought not, because the record of it ought to be returned into the Bench with the *exigent*, which is the warrant to the

Outlawry does not lie in detinue of charters.

The coroner on *certiorari* returning defendant duly outlawed is not sufficient to make him an outlaw; the Court will reverse it without writ of error if it appear that defendant delivered a *superfedeas* at the fifth county court.

The special *capias utlagatum cum extendi facias* does not authorize the sheriff to sell the goods taken under it.

1. And. 36. N. Ben. 27. Br. Execute, 108. Godb. 84. Co. Lit. 128. 3. Cro. 278. 27. E. 3. 80. Dy. 317. a. 5. Co. 90. 8. Co. 96. Yelv. 57. Mo. 73. 4. H. 4. 1. a.

[* 223. a.]

4. 11. H. 6. 6. 53. 38. E. 3. 14.

1. Inst. 259. b.

14. 21. 22. 30. H. 6. 7. 42. 42. 4. & 5. b. 13. 22. E. 4. 4. 2. 44. E. 3. 41. Fulb. 65. 20. H. 7. 3. b. 40. 42. E. 3. 35. 13. 8. H. 6. 29. b.

[22. Vin. Ab. 329. 2. Com. Dig. 380.]

15. El. 317. a. 14. 6. 1. a. 7. E. 4. 2. a. Finch. fo. 116.

1. And. 36. } S. C.
An. Ben. 27.

[2 H.H.P.C. 206, 207.
Gillb. Executions, 183,
184. 2.Hawk.P.C.634.
Co. Lit. 288. b.]

Plow. 49. 10. H. 7. 23.
1. E. 3. 21. Outlawry 7.

40. Aff. 12.

Bro. Averment, 13.

• [223. b.]

1. H. 7. 13.

8. 30 H.6.37.3.4. 15.E.
4. 42. 8. 10.Co.77. 4.
H.4. 1. F.N.B.21. f.
Br. Restitution 27. Ut-
lage 28. Dy. 196. a.

sheriff to proclaim him &c. And although the coroners give the judgment of outlawry, and make a short memorandum in their record and book of it, yet the custody of the record doth not appertain to the coroners, nor is their return a sufficient record of the outlawry; but the *certiorari* serves in such cases for the King, to hasten the sheriff, who is wont to be slack in returns of outlawries, and to cause him to be amerced for his falsehood and concealment &c. And this was the opinion of LENNARD, *Chief Clerk*, and it seems reasonable, and such writs of *certiorari* to the coroners are original and judicial also. (25) See for a similar matter in *Libro Intrationum*, fol. 79. according to the opinion above &c. and in 28. *Libro Affis*. 31. [154. pl. 49.] accordingly. And see for outlawry of felony *M. 1. E. 3. 40.* [20 b. pl. 5.] where the sheriff returns the party outlawed, and he avers that he rendered himself at the 5th county court; and the Court wrote to the coroners to be apprized of it. See of a *certiorari* directed to the coroners to be apprized of an outlawry, where the sheriff had returned four exactions, and the coroners returned that he was legally outlawed, and the sheriff was amerced fifty pounds, in *Quatermaine's* case in the year 36. *H. 6. 13.* [24. b. pl. 20.] but process there was awarded against the sheriff to come in to answer to his return and answer. And see † *Trin. 18. E. 4. Rot. 24.* in *B. R. Derb. s. John Stanley* and others defendants in appeal of murder at the suit of *Henry Vernon*, of the death of *Roger Vernon* his uncle, were put in the *exigent*, and the sheriff returned as above, yet the same *I. S.* at the 5th county court surrendered himself: and *William Hulse* Attorney of the Lord the King says, that although the sheriff returned as above, * yet the said *I. S.* at the said 5th county court was outlawed, and for the King demanded a *certiorari* to the coroners, who certified that he was outlawed, upon which the said *I. S.* brought a writ of error, and assigned for error that at the time of the outlawry he was in prison at *Chester*, and had a *seire facias* as well to the party as to the terre-tenant &c. the party appeared and acknowledged the allegation to be true; the said *I. S.* was exonerated of the outlawry: and the plaintiff counted against him, and the declaration thereof was of the same Term, *Rot. 28.* Defendant pleaded not guilty: the plaintiff demurred in law, thereupon judgment for the defendant; and the defendant taken at the suit of the King, and the

the King's Attorney acknowledged the plea of the defendant to be true.

(26) And note, that the outlawry of *Proctor* above was reversed for the causes above, in *C. B.* in another Term, and without a writ of error, according to the opinion of *East*.

[2. Crompt. Prac. 63. & 5. Com. Dig. 653.]

37. *H. 6.* 3. [fol. 17. a. pl. 4.] and a writ of restitution was awarded to the sheriff of *York* to restore the goods of *Proctor* which were to the value of one hundred pounds, who returned that he had sold the goods for forty pounds, and brought the price thereof into court, in *Trin. Term* next, but the return was holden insufficient: for the *capias utlagatum cum extendi*, and *scire facias bona* is by the oaths of good and lawful men, but no mention of the sale of them is in the writ, therefore it is done without warrant, as it seems. But note these words in this writ, *s. and those things which you shall find by that inquest you shall take into our hands and safely keep, so that of the true value and issue of the same you answer to us.* So it seemed to CATLYN, SAUNDERS, and WHIDDON, that the sheriff may sell them, or answer the value to the King, and retain the goods himself &c. *Ideo quære inde.*

20. El. 363. a.

8. Co. 142. a. 5. Co. 9a.
8. Co. 96. b.

9. H. 6. 21.

20. H. 7. 4. 8.

[2. Bac. Ab. 231. 379.
2. Lev. 49. & see 5. Mod.
61. 2. Vern. 313.]

East. 22. *R. 2. B. R. Rot.* 50. *Walter Baker* was outlawed: upon which outlawry *Humpbrey Beauchamp* brought a writ of the king to the escheator, that he render to the said *Humpbrey* twenty pounds of the goods of the said *Walter* of the gift of the king. Afterwards by writ of error the said *Walter* reversed the said outlawry, and was adjudged to his lost goods. Upon which the said *Walter* impleaded the said escheator for the said twenty pounds, who produced the writ aforesaid, proving that he paid the money aforesaid to the aforesaid *Humpbrey*, and that he is exonerated, and it is commanded the said *Humpbrey* that he should answer and satisfy the said twenty pounds, who prayed aid of the king: yet it was adjudged that he re-pay the said money, and *Walter* have execution, *ex libro Magistri Noy.*

Trinity Term, 5. Queen Elizabeth.

Reve against Allee.

The appearance of the parties being entered on the plea-roll, but an effoin for the defendant on the same day, and a nonsuit for default of appearance of the plaintiff entered on the effoin-roll; the plaintiff may proceed to judgment, for the record of the appearance by the plea-roll confounds the effoin.

Novel Liver Entre Dett.
11. fol. 127 pl. 18. S.C.
Dy. 214. a. 324. b. 260. b.

* [224. a.]

4. 11. H. 6. 6. 53. Br.
Default 39. 45. E. 3. 10.
Co. Magn. Ch. 127. 4.
H. 7. 5. Stat. de Marl.
cap. 13. Dy. 97. 265.
268. a.

[Com. Dig. tit. Plead.
er, X. 1.]

So it was adjudged *Mich.* 31, 32. *Eliz.* C. B. and also *East.* 34. *El.* it was so agreed PER CURIAM.

(27) **N**OTE, That in *Easter* 5. of this Queen, *Rot.* 349. issue was joined upon a foreign plea in the county of *Surrey*, and the *venire facias* returnable in five weeks of *Easter*; at which day came the parties, and the sheriff did not send the writ, therefore as before it was commanded to the sheriff that he cause to come &c. on the morrow of the *Trinity* twelve &c. by whom &c.—and this continuance was made upon the plea roll: and yet at the said five weeks of *Easter* the defendant was effoined *unde venire fac.* and (because the plaintiff being demanded came not) the plaintiff was nonsuited, and this nonsuit entered upon the effoin roll, and notwithstanding t. his nonsuit, he proceeded in the issue, which was found for him, and had judgment to recover, notwithstanding the effoin and the nonsuit; and this by the advice of the Court; for it was said that the recording of the * appearance of the parties in court at the day when the effoin was cast, confounds the effoin, without any challenge or exception to it. And in the case where the *venire facias* is served and returned at the first day, and then the defendant is effoined, this serves for nothing, because the Court will allow him an effoin or a default by the statute of *postquam aliquis &c.* [*West.* 2. c. 27.] although no effoin had been cast, therefore it is not necessary to adjourn. See where the jury appeared at a *nisi prius* sued by the defendant *cum provis.* and neither the plaintiff nor his attorney appeared, what shall be done, *H.* 17. [*12. Eliz. post.*] fol. 286. pl. 44.

Damport and Wife against Wright.

A fine by the husband bars dower unless the wife claim within five years after his death.

(28) **T**HE husband aliened his land by fine with proclamations and survived the five years, and then died,

(28) *East.* 19. *El.* *Rot.* 855. C. B. Between *Tracy* and *John Broylbolme*, which case may be seen in the New Book of Entries 171. within what time a fine ought to be.

and

and his wife being sole, of full age, of sound memory, out of prison, and within the four seas; does not make any demand or claim of her dower within five years after the death of her husband: *Quære* whether she shall be barred. And see *Hil. 4. H. 8. Rot. 344.* such bar was pleaded; and admitted for a good plea, for it seems that by the second article of the saving after the clause of exceptions of femes covert contained in the statute of fines in the 4. of *H. 7. c. 24.* wives shall be excluded of their dower; because the reason, ground, and matter of their endowment was the seisin of their husbands during the marriage which was before the fine levied; although the action be given afterwards, *s.* after the death of the husband, if they will not prosecute for their right, within the five years after the action accrued &c. And note that the averment of full age, sane memory, out of prison, within the four seas, and sole or uncovert, was expressly pleaded in the said bar of dower; *Hil. 4. H. 8.* But it is not so pleaded in the *Exchequer Chamber Case* between *Statuel* and *Lord Zouch*, *Plow. 353.* And *quære* well whether it ought.

Mo. 53. S. C.
Co. 2. 93. a. 10. 49. b.
10. 9. 8. b. 6. E. 6. 72. b.
Coke 5. 123. b. 8. 10.
Co. 72. 49. & 99. Reil.
Contin. 409. Goulds.
148.
[Plow. 373. but see
Cruise on Fines 212. and
a. Bac. Ab. 146]

Plow. 379. Br. Feoff.
ment al Uses, 9.

Plow. 354. 356. Plow.
376. [which see, with
the books cited in the
margin there, and 1.
Leon. 76. 1. Lev. 26.
See also for the negati-
ving of exceptions, 1.
Term Rep 141. Dougl.
345. 1. Term Rep. 320.]

(29) **T**HIS question was asked by the keeper of the great seal; Whether a bastard begotten out of marriage between a father and mother, English, and liege-subjects at *Tournay* beyond sea, after the conquest of it by *Hen. 8.* and during the time of the allegiance; be capable as a stranger denizen, namely to purchase and implead here within the realm by the law of the land or not? And as it seemed to *CATLYNE*; *Chief Justice*; *SAUNDERS*; *Chief Baron*, *WHIDDON* and *BROWNE*; *Justices*, and to *MYSELF*; he is in the same situation as if a frenchman * husband and wife come here into *England*; stay here; and have issue a son; in this case, by his being born here, he is a liege-man, although his

A bastard born of English parents beyond sea; but under the dominions of the crown is a liege subject of England.
[*Jenk. Cent. 5. c. 91.*
S. C.]
7. Co. 22. b. 26. Starvel.
Prerog. 39. 2.
Vaugh. 281.
1. R. 3. 4. 2. and the sta-
tute of 25. E. 3. st. 4.

* [224. b.]
7 Co. 6. a. Br. Devise, 9.
16. H. 8. B. N. C. 280.

(29) *Ex Rot. Parl. 17. E. 3.* resolved by all the Lords and Grantees, that children of subjects born beyond the sea in the service of the king shall be inheritable. So *Tr. 7. E. 3. Rot. 2. B. R.* it was adjudged.

And note *Rot. Parl. 42. E. 3.* That children born out of the allegiance of the King of *England* do not enjoy the inheritance of ancestors in *England*, and that children born in *Calais* or in *Gascogne* are there as in the statute [*de prerogativa regis 17. E. 2. st. 1. c. 12.*] holden in *Com. Record.* 30.

* *Jeseph Coll's Case* in the *Exchequer*, 2. *Jac.* His father and mother encointe inhabiting in *Calais* when it was taken by the *Frenco*, fled into *Flanders*, and there the woman was delivered of the said *Jeseph*: adjudged that he shall be a denizen, because the parents were born at *Calais* and he himself was begotten there, although born in *Flanders*.

[Bac. Ab. Alien. (A.) 1. Com. Dig. 297. And Doe ex. d. Count Durore v. Jones, 4. Term Rep. 300.]

father and mother were aliens. And so in the other case above, *Tournay* was *pro tempore* parcel of the realm and dominions of *England*, as *Calais* was.

To constitute robbery, there must be a putting in fear.

Dy. 183. b. 261. Stamford. 127. 125. a. Mo. 5. Roll. Contin. Harman's Case, 154.

[1. Hawk. P. C. 149. 150. Leach's Cases in Crown Law, 203—207. 259.]

(30) **NOTE**, That at the gaol delivery of *Newgate* after the end of this term, one was indicted, for *that he with force and arms at B. in the king's highway there, forty shillings in monies numbered &c. feloniously did take from the person of I. S.* And he had the book in this case, because it is not a robbery if the person be not put in fear, as by assault and violence.

Quilter's Case.

A Judge of Assize by virtue of a general patent to receive fines with a *non obstante*, took the acknowledgement of a fine without a *dedimus potestatem*, and holden good; though the Chief Justice of C. B. alone regularly hath such power.

Jenk. Cent. 5. c. 90. S. C. Br. Patents. 109.

West. symb. in Fines, § 4. b.

1. Keb. 461. Roll. Contin. 172.

1. H. 7. 9. 2. Br. Fines levy 124.

[Cruise on Fines, 74. 2. Inst. 512. Wood's Inst. 235.]

(31) **MEMORANDUM**, That in *Trinity Term* in the 28th year of *H. 8.* in *B. R. Rot. 67.* a fine levied in the bench by one *Quilter* and his wife before *CHRISTOPHER HALES Esq. Attorney General* of the king, and acknowledged, and by him certified into the bench without any writ of *dedimus potestatem*, was affirmed for good and sufficient, although *HALES* was not a Judge in any of the Benches, but he was a Justice of Assize in this circuit with *SERJEANT HYNDE*; and they had a general patent to receive all fines, concords, and recognizances in their circuit, jointly and severally acknowledged for that time in that circuit, with a *non obstante* (a) any act, statute, ordination, &c. which patent with all the recognizances were certified into the Bench, and by the *Custos Brevium* certified into *B. R.* by virtue of a writ of *certiorari* issuing out of the said *B. R.* in a writ of error, brought by *Quilter* and his wife, in the levying of the fine aforesaid. And the authority was adjudged good upon good consideration. *Test. J. Fitzjames*—and the fine affirmed. *Note*, The patent above was in derogation of the office and authority of the Chief Justice of *C. B.* who alone by prerogative of his office can take the acknowledgement of a fine without a *dedimus potestatem*.

(a) By 1. W. & M. sess. 2. c. 2. §. 12. it is enacted that from and after that session of parliament no dispensation by *non obstante* of or to any statute or any part thereof shall be

allowed, but that the same shall be holden void, and of no effect except a dispensation shall be allowed of in such statute, &c.

Sir William Seyntloo's Case.

Pach. 2. Reg. nunc. in
Scacc. Rot. 111.

(32) *SIR William Seyntloo* knight, captain of the guard, and his wife late the wife of *Sir William Cavendish* knight, treasurer of the household by patent made by king *H.8.* for the term of his life; were brought into the exchequer by process to account for the arrears due to the Queen for his office from the day of the date of the letters patent until the day of his death, which amounted as it is said to five thousand pounds, because they were returned terre-tenants in right of the wife, of certain land which was *Sir William Cavendish's* (since the patent) to himself alone; and of which he had made conveyance since the * marriage to him and his wife jointly for her jointure, and to his heirs, because it was returned by the sheriff into the exchequer, that there were no executors nor administrators of the said *William C.* And the said *Sir W.S.* and his wife have demurred in law with the Queen in the exchequer, whether they are accountable in this case or not, because they are not privy to his reckonings, and no judgment was given against *Cavendish* in his life-time of any debt on the account of his office, so that his lands should be charged &c. And great search of precedents has been made for the case, of which delivery has been made to the Justices of both Benches, for the Barons would not resolve the case, being so great a question and doubt, without their advice and opinion. And this term the argument of the case was appointed by command of the Queen by all the Judges and Barons of the Exchequer. (33) But note that judgment is given in this case aforesaid by the Barons, that of such lands as *Sir W. Cavendish* first purchased to himself and his said wife, and the heirs of *Sir W.* which was in effect the substance of all the lands of *Sir W. Seyntloo* and his wife, they are discharged from accounting as to that. Note this for the debt accrued after the said jointure made. And in *Hilary Term* next they pleaded the Queen's pardon, in which all the case above, and the demurrer were recited, and also that by the search of divers precedents in the exchequer it appeared that process had been made by the prerogative of the king against the terre-tenants to account: and some had been compelled to account, and some had pleaded pardons and releases &c. Yet at the humble prayer of the said *W. S.* and his wife, and in consideration of the faithful service of the said *W. S.* captain

The terre-tenants of land wholly belonging to the king's accountant after he became so, are liable to account for the arrears due from such officer. But lands purchased jointly to himself and his wife for her jointure are discharged. So if seized in fee he convey to both for her jointure before he get the office, she shall not be charged for this land.

* [225. a.]

Jenk. Cent. 5. c. 89. S.C.
Plow. 321. a. 3. Co. 12. b.
10. Co. 56. s. 3. Co. 171.
Plow. 315. Dy. 207. b.
2. Rol. Ab. 156. Roll.
Contin. 302. F. N. B.
286.
Litt. 125.
3. Co. 21.

[Vide Crompt. Jur. 4.
106.]

Br. Exchange 34.
40. Aff. 36.

Fitz. 150. q.
Plow. 261. 321.
[Gilb. Executions 268,
269.]
2. Inst. 19.
8. Co. 171. 11. 93. a.
50. Aff. 5. 5. Mar. 160. b.

Palm. 167.

of the guard, and for one thousand pounds paid into the receipt of the exchequer, the Queen pardoned them &c. Note in Fitz. Nat. Brev. [fol. 599, 600.] in *idemptitate nominis*, such account for the king lies against the terre-tenant &c.

See the statute of *Magna Charta*, ch. 8. and 33. *H. 8. c. 39.* for this prerogative for the king's debt [and 13. *Edw. 1. c. 4.*]

Killegrewe against Trewynnard.

Warrant of attorney entered after writ of error brought, the plaintiff in error delaying to deliver the writ to the clerk of the treasury till six days after the return day.

[1. Brownl. 46. S. P.]
Dy. 81. a. 149. 231 33b.
344. 363. a. 26138. E. 13.
64. b. 8. Plow. 440. b.
3. 7. 8. 11. H. 4. 10. b. 16.
4. 44.
Dy 180. a. 262. 1. 15. H.
7. 13. 14. 41. E. 3. 12.
19. H. 6. 67. 7. H. 4. 4.
1. Roll. Abr. 290. (1.) 4.
a. Keb. 459. 26. H. 8. 43.
7. H. 6. 30. 5. Co. 44. Dy.
230. b. Palm. 199.

* [225. b.]

(34) **KILLEGREWE** recovered in debt *Mich. 2. & 3.* of the present Queen against *Trewynnard* as heir (upon a bond made by his father, in which he bound himself and his heirs) by a *nihil dicit*, or a *non est informatus*: and for defect of a warrant of attorney for defendant, he brought a writ of error which was returnable the first day of this term; but the writ was not delivered to the clerk of the treasury until six days after the day of the return, and therefore *per opinionem Curiae*, the defendant was received to put in a warrant of attorney for the plaintiff in the writ of error, and command was given to the clerk of the warrants to enter the warrant accordingly, which was accordingly done. So note in * some cases amendment may be after writ of error brought (a): and afterwards in *Michaelmas Term*, 8. of the present Queen, *Killegrewe* acknowledged satisfaction &c. which is recorded in *C. B.*

(a) By 18. *Eliz. c. 14.* No judgment after *verdict* shall be stayed or reversed for &c. or for want of any warrant of attorney, and 4. *Ann. c. 16.* extends this to judgment by confession, *nihil dicit*, or *non sum informatus*, in all cases except where there is no warrant

of attorney which still is erroneous. But see 25. *Geo. 3. c. 80. §. 1. 13. & 19.*—For the amendment of records after error brought, see *Dougl. 114. 5. Bur. 2730. 1. Term Rep. 783. 3. Term Rep. 659. 749.*

5. and 6. Queen Elizabeth.

(35) *MEMORANDUM*, That *Michaelmas Term* in this year was wholly adjourned by writ of the Lady the Queen until the octave of *Saint Hilary* at *Westminster* on account of a great plague and infection of the air in *London, Westminster*, and the suburbs of the same. And *note* the adjournment was made on the very day of the effoin of the octave of *Michaelmas* at *Westminster* in the bench by JUSTICE WALSH who was in turn to have kept the effoin there. And because the plague was not ceased by the first return of *Hilary Term* next, it was adjourned from *Westminster* to the castle of *Hertford* in the county of *Hertford* by WESTON, Justice, (who was in turn then to have kept the effoin) until fifteen days of *Hilary*, and there being again he kept the effoin of the quinsieme of *Hilary*, and the full Term did not commence before the fourth day—note this. And *note* that the first return, s. the octave of *Hilary*, might not be holden and begun at *Westminster*, and on the same day adjourned to *Hertford* by the opinion of CATLYN Chief Justice, DYER Chief Justice of C. B., BROWNE Justice, and WESTON Justice, who were examined on this question before the feast of *Christmas* by command of the Queen and her Council, and afterwards the other Judges and Serjeants at Law agreed to it. Also the sheriffs were nominated and appointed without any meeting of the Judges on the morrow of *All Souls* at the Exchequer according to the common usage; but for the most part none were named except one of the

Adjournment of one entire Term and two returns of another. The king by his prerogative may nominate sheriffs without the usual meeting to elect them in the exchequer.

1. Cro. 12. 2. Cro. 16. Apres 286. a. 1. Rol. Abr. 130. (A.) 5.

[Vin. Ab. Adjournment A.]

1. Cro. 14. 200. [1. Com. Dig. 233. 3. Bl. Com. 278. 3. Term Rep. 185. 1. Term Rep. 116. Co. Lit. 135. a.]

Hob. 146. Ante, 212. a. 2. Keb. 281.

(35) *Bishop v. Harecott* [Cro. El. 210. 1. And. 224. Sav. 140.] Upon *assumpsit* the case was, *Harecott* assumed after the day of the effoin and before the *quarto die post*, to deliver an indenture &c. before the end of the Term of the *Holy Trinity* then next following, and adjudged that he ought to deliver the indenture before the end of the same Term, and shall not have time until *Trinity Term* at twelve months after: for as to the understanding of the public, the Term shall not be said to commence until the full Term, at the *quarto die post*, although in law as to the return of the writs and offices it begins at the day of the effoin, *Trin. 32. El. B. R. Rot. 311.*

Note, *Trin. 35. El. [Poph. 33.]* if the adjournment of the Term be to be made in *Octab. Trin.* then it shall be made in every court, *B. R. C. B.* and Exchequer, the very first day of the Octave, but if it be adjourned to *Octab. Trin.* then it was holden by the Justices that it shall [not] be adjourned until the rising of the Court upon the 4th day of the said *Octave*.

So it was in *Mich. Term*, in 6. Car. the two first returns were adjourned to *Tres Michaelis* which was upon the Wednesday, but the full Term did not commence until the Saturday after, which was the *quarto die post*.

2. Inst. 559.

[1. El. Com. 342.]

two who remained on the list the last year past; although it was holden that the Queen by her prerogative may make a sheriff without such election, notwithstanding any statute to the contrary.

Precedents of the adjournment of terms.

[Jenk. Cent. 5. c. 95. S. C.]

[See the case above, pl. 35.]

* [226. a.]

(36) *MEMORANDUM*, That the precedent of *Michaelmas Term* in the 26th year of *H. 8.* which was holden at the town of *Saint Albans* in the county of *Hertford* was searched and viewed for these adjournments aforesaid, and well looked to and considered; and the first writ of the said * adjournment in the 35th year was, on account of the plague, to adjourn the four first returns of *Michaelmas Term*, s. the *octave, quinsieme, tres septim'* and *quense Mich.* until the morrow of *All Souls* at *Westminster*: and the *teste* of it was on the vigil of *Saint Michael*, s. on the 28th day of *September*, and at *Walden*. And the next writ of adjournment to the morrow of *All Souls* was also on account of the plague at *Westminster*, unto the town of *Saint Albans* on the morrow of *Saint Martin*; and also that all pleas, writs, bills, and other process whatever returnable at *Westminster* on the said morrow of *Saint Martin*, on the *octave* of *Saint Martin*, in fifteen days of *Saint Martin*, or at any day between &c. should be returnable on their days, and the returns thereof at the said town of *Saint Albans*. And the *teste* of this writ was at the Honor of *Amptbill*, on the last day of *October* in the 35th year. And the last writ of adjournment by which the next Term of *Hilary* was adjourned from the town of *Saint Albans* to *Westminster* in the county of *Middlesex*, was on account of the infection of the air at the town of *Saint Albans* and adjacent places, as above; which was false, for there was no infection there; and the *teste* of this writ was at the town of *Saint Albans* on the 28th day of *November* which was the last day of the Term of *Saint Michael*.

(37) And note that the said last writ was general, s. to adjourn

(37) *Barton v. Bromlowe and Lewer*. [Mo. 365. Cro. El. 388. and Poph. 100.] In *Lancaster* a common recovery was had in which the writ bore *teste* on the 10th of *March*, which was the first week in *Lent* returnable in 4 weeks of *Lent next to come*, and adjudged a good return, and that *next to come* had relation to weeks and not to *Lent*: And it is not like this case, for *next to come* cannot have relation to the same day of the date. *Vide* long sto. E. 4. 26 for the killing of 12 wild beasts, from the 2d day of *July* until the 20th day of *July next following* where *next* had relation not to *July* but to the day.

Mich. 13. Jac. G. B. Pye v. Coe, [Brownl. 74.] A. made a bond to B. on the 17th *Nov.* 1614 to pay one hundred pounds on the 19th day of *Nov. next ensuing*, and another one hundred

journe all pleas, writs, bills, and proceſſes returnable, or having
 day in any term or terms, or returns from fifteen days of
Saint Martin next to come at the ſaid town of *Saint Albans*.
 that they ſhould be adjourned from the ſaid town of *Saint Al-*
bans to *Westminſter* without naming the octave of *Hilary*, or
 any other return day in certain &c. And note well whether
 theſe words "*next to come*" can be intended the ſame *quinsieme*
 of *Saint Martin* in which it bears *teſte*, or ſhall be a year
 after &c. And it was holden by all the Judges, that it can-
 not be taken to be the ſame *quinsieme*. And according to
 this the writ of adjournment of *Eaſter Term* next from the
 caſtle of *Hertford* to *Westminſter* was made, and was gene-
 ral as the other writ was: but the ſuggeſtion of the plague
 at *Hertford* was omitted, but it was "*for divers urgent*
cauſes &c." And "*from the octave of the purification of*
the bleſſed Mary of this preſent Term of Saint Hilary," in-
 ſerted by CATLYN Chief Juſtice, and the *teſte* was, *At the*
caſtle of Hertford on the 12th day of February in the 6th year:
 and this by the advice of all the Juſtices of both benches, and
 the Chief Baron of the Exchequer omitting the words,
 "*next to come.*"

Dy. 38.

4. E. 4. 40.

Poſt, pl. 39.

Dy. 376. a. 396. pl. 22.

dred pounds the firſt day of *December* enſuing; adjudged that the firſt one hundred pounds
 ſhall be paid on the 19th day of the ſame *Nov.* and the intent of the party appears by the
 appointment of the ſecond payment of one hundred pounds. By Maſon's Reports. [Cro.
 Jac. 678.]

22. E. 3. 21, Adjournment upon a mortality, poſt, pl. 39.

* Hilary Term,
6. Queen Elizabeth.

Where the assizes are adjourned, *non venue* of the Justices at the day, puts the parol without day. But a re-attachment and re-summmons, or *habeas corpora jurata* tested on that day may be awarded to the next assizes.

[Jenk. Cent. 5. c. 95. S. C.]

9. H. 6. 40. a. 47. E. 3. 2. 6. H. 7. ultim.

[See Cro. Eliz. 12.]

(38) **I**T was holden by all the Justices of assize assembled, that all the assizes which were adjourned to *L.* or *Westminster* out of the country are now without day by the non-venue of the Justices there, although they are not discontinued by reason of the statute of 1. E. 6. [c. 7. §. 2.] and now the plaintiffs ought to sue out a re-attachment against the defendants, and a re-summmons or *habeas corpora* against the recognitors, and the writs shall be of the *teste* of this Term, and returnable at the next assizes &c. (39) Also it was holden by all the Justices aforesaid, that the writs of adjournment for the said Term from *Saint Albans* are good, and that the *teste* of the last writ, which was at the town of *Saint Albans*, on the 28th day of *November* in the 35th year of *H. 8.* was good enough, and therefore they held it the surest way to follow this precedent in the end of this Term, without antedating it; but all agreed that those words "*next to come*" should be omitted, for it makes the writ bad; Wherefore &c.

† Wherefore it seems that this is not a discontinuance. *Br. discontinuance de proces, 2.*

† [This note in orig. is entered *post. 235.* in this its right place.]
b. pl. 22. as it seems by mistake instead of

Nevil's Case.

Where one of two defendants in *ejectione firmæ* pleads an entry of the plaintiff to which he demurs, there cannot be judgment against the other pleading only the general issue, which is found against him.

26. H. 6. Nontenure, 20. Coke 9. 77. b. Vide la. 8. E. 4. 24. 26. H. 8. 6. 27. H. 8. 30. 7. E. 4. 6. 7. 11. H. 6. 48. b. Br. Confess, 1. 8. H. 6. 13. 4. E. 4. 32. Fr. Judgment 38. 5. 10. 16. H. 7. 7. 13. 9. F. N. B. 220. h.

[Str. 266. Co. Lit. 125. b.]

(40) **E***EJECTIONE firmæ* was brought by *Nevil* and another. *Nevil* appeared, and pleaded the general issue, and the process was continued against the other, until he appeared, and then he pleaded an entry of the plaintiff into the land *puis d'axein continuance*, judgment of the writ. And to this plea the plaintiff demurred in law, *et curia avisare &c.* And in the mean time the first issue was found for the plaintiff against *Nevil* by *nisi prius*; and now the plaintiff prayed his judgment, and it was doubted; but the better opinion was, that the plaintiff shall not have judgment, because the plaintiff by the demurrer in law hath confessed the writ abateable. It would have been otherwise if he had

only

only imparled to the plea, as it is in 14. & 15. E. 4. [6.a. pl. 2. [Vide *supra* 210. b. pl. 26. pl. 1. & 3.] in trespass; and the writ by the entry of the plaintiff above was abated, because the term is to be recovered. *Sed quare.*

A man may plead what goes in bar after imparlance, not what goes to the writ: so resolved in *Marshall and Allen's Case.* [Palm. 406.]

(41) **M**EMORANDUM, That it was agreed among all the Judges, that the original writs for fines and recoveries of this Term may be made returnable more safely, and without any doubt, on the octave of *Saint Hilary* at *Westminster*, and not in fifteen days of *Hilary*, or on the morrow of the purification at the castle of *Hertford*, because the adjournment was made on the * 20th day of *January* from *Westminster* to *Hertford*, and between that day and any of the said three returns there are not fifteen days, Wherefore &c. And yet the style of the fine shall be, *this is the final concord made in the court of our Lady the Queen at the castle of Hertford from the day of Saint Hilary in fifteen days &c.* So were the greater part of all the fines of *Michaelmas*, 35. H. 8. s. made returnable at *Westminster* on the morrow of *Saint Martin*, and on the octave of *Saint Martin*, and not at the town of *Saint Albans*: and yet the final concord was made at the town of *Saint Albans &c.*

Returns of Writs

* [227. a.]

Burlace against Warde.

(42) **A** SCIRE FACIAS brought by *Burlace* against *Warde* to have execution of a judgment in assize in the 2d year of *Edward 6.* as well of the lands as of the damages &c. The defendant pleaded an entry of the plaintiff into the land, mesne between the verdict and the judgment in the assize, *whereby he was seised in his demesne as of fee &c.* judgment of the writ: and to this plea the plaintiff demurred in law, and the opinion was, that it was no plea. But *quare,*

CORNWALL.

Entry of the plaintiff between verdict and judgment "*whereby he became seised, &c.*" is no plea to a *scire facias* for execution and damages recovered in assize. But if he had pleaded that plaintiff is still seised, *quare.*

[19. Vin. Ab. 285.]
Dy. 76. 49. E. 3. 23.
16. E. 3. F. Scire Facias, 5. 7. H. 6. 16.
Br. Ass. 17. 14. H. 7.
17. 8. H. 6. 22. Br.
Non-tenure, 21. 41. 8.
E. 4. 19. 9. H. 5. 11. b.
11. H. 4. 16. 2. Ma.

107. a. 39. E. 3. 18.
33. H. 6. 24. b. 31.
H. 6. Non-tenure, 21.
5. E. 4. 5. b. 15. E. 4.
5. b. 22. H. 6. 41. a.
[5. Com. Dig. 346. 4.
Bac. Ab. 424.]

if the plea had been, *and yat is seised &c.* which amounts to non-tenure.

On the grant of an annuity, *et si contingat* to be in arrear, distress for it, and for 6s. and 8d. *nomine pena*: as no grant of this penalty is expressed in the deed, Whether debt will lie for it? *qu.*

If rent charge for life, *proviso* not to charge the person, still debt will lie for the arrears by executors after the estate is determined.

Where two are named in the deed as grantors, but one only seals, it is not necessary to mention the other in the declaration.

See the record of this Novel Entre, Dett. pl. 31. fol. 120.

Co. Lit. fol. 146. [& 162.]
28. H. 8. 13. a. 37. H. 6.
15. b. 6. H. 4. 6. 11.
H. 6. 23. 4. Co. 49.

[Cro. Car. 170. Co. Lit.
17. b. Mr. Hargrave's
note (4). 2. Wilk. 224.]

Dy. 65. a. 221. b. 4.
Co. 50. Dy. 87. 13. b.
11. H. 6. 23. Br. Gar-
rishment, 16.

* [227. b.]

38. E. 3. 8. Dier, 13.
Alley, 21.

[1. Sid. 238. Cro. El.
544. and see the cases
cited in 2. BL Rep. 950.
but see 5. Burr. 2614.]

18. H. 8r 23. a. Dy.
253. a.

18. H. 8. 21. a. 19.
H. 6. 41. 17. E. 3. 48.
18. E. 3. 9. Det. 6. 7.
Co. 39. b. 6. Co. 41. b.
Lit. 47. a. 221.

Newdigate, Executor of Button, v. Capell.

(43) **SIR GILES CAPELL** by his deed (in which *Sir Henry Capell* his son and heir apparent joined)

granted an annuity to one *Button* for the term of his life out of all his lands in *Potters-hall* in the county of *Hertford*. And if it should happen that the said annuity should be in arrear &c. that then it might be lawful for the said *Button* upon the tenements aforesaid, as well for the said annuity as for six shillings and eightpence, in the name of a penalty, as often as &c. to distrain &c. and no other word of grant of the penalty. And this deed was sealed by *Sir G.* only, and a label and wax for *Sir H.* but no seal or impression &c. The annuity was in arrear for divers years, and for the arrears, and also the penalties above, the executors of the grantee brought debt against the executors of *Sir G. Capell*, and counted upon this grant without making mention of *Sir H.* by virtue whereof the grantee was seised in his demesne as of freehold, which was not good. (44) And the defendant demanded *oyer* of the deed, and it is read to him in these words &c. Which being read, he pleads that there is not &c. any

such vill, hamlet, or place known out of which &c. called *Potter's Hall*: to which plea the plaintiff demurs in law. And it was argued, Whether the plaintiff ought to make any mention in his count of *Sir H. C.* or not. And **DYER** and **WESTON** thought, not, for the deed was void against him, and if the defendant will have him to be named in the count, then he ought to have averred in fact that he was a party to the deed, according to 28. H. 6. [3. a. pl. 11.] &c. But **BROWNE** and **WALSHE** *contra*. But for the penalty it was doubted among all the Judges, whether action of debt lies, because the person of the grantor was never charged with it; and also here the words, *and if it should happen &c.* are not words of grant, and yet it was agreed that if a rent-charge be made for life with a *proviso* that it should not extend to charge the person by writ of annuity according to

Littleton [sect. 220.] yet after the estate is determined, the executors for the arrears shall have debt, wherefore here, [32. Hen. 8. c. 37.] &c.

Sackforde's Case, Master of the Requests.

(44) **M**EMORANDUM, That the *post fine* for the *lic. con.* was estreated, and certified into the Exchequer among other estreats, which was six pounds for certain manors and tenements in the counties of *Suffolk and Essex* of the value of forty pounds, that is to say, in *Suffolk* six pounds, and in *Essex* thirty-four pounds, but all were comprized in one concord, as is very often done, though the originals are several, but returnable all on the same day. And now in the Exchequer *Sackforde* would be discharged of this six pounds by the general act of pardon, which discharges all such fines under six pounds; and if the fines had been estreated severally, s. in each county according to the values &c. they would have been pardoned. See and weigh well the words of the statute thereof, because they are ambiguous. And now *Sackforde* would have the said estreat of six pounds amended and divided according to the several values above: but he could not, for the clerks have been used to make only one entire fine *pro licentiâ concordandi* when divers counties are comprized in one and the same concord, and it would be dangerous to alter it now.

Where lands lying in different counties are comprized in one concord, the fine *pro licentiâ concordandi* shall be one entire fine for the whole.

5. Co. 44. 2. Inst 512.
514. 15. E. 4. 33. 19.
H. 6. 13.

[Cruise on Fines, 31.]

F. N. B. 47. a. 7. Co. 27.

West's Precedents,
Fines, fo. 10. sec. 30.

[Browne on Fines, 25.]

Palmer q. t. against Franklin.

(45) **D**EBT on the statute of apparel made in the 24th year of H. 8. [c. 13.] as well for our lady the queen as for the plaintiff. The defendant pleaded outlawry in the plaintiff after judgment in debt brought against him by one *Richard Eley* in the same Bench, and pleaded the record

Outlawry of plaintiff in C. B. pleaded to an action there, if on the issue of *nil sci record* an exemplification of it under the seal of B. R. (into which it has been removed on error) alone be produced, it is a failure of record: so if the

(45) *Micb.* 32. 33. *Eliz. B. R.* [Ow. 22. Cro. El. 203.] *Smith* brought an action of debt on bond against one *Barnard*. Defendant pleaded outlawry in the plaintiff, and concluded in abatement of the writ, and had a day to have the record, upon which day he failed of it, &c. The Court took this difference, that in debt on bond outlawry in the plaintiff is a plea in bar, because all debts on specialty are forfeited to the king. *Aliter*, in trespass, or debt on contract, for that is not in abatement of the writ, for the king cannot have a simple contract: but after the outlawry is pardoned, plaintiff may have an action for it again, and so inasmuch as he failed to have the record at the day the plaintiff recovered. [2. Term Rep. 569. 1. Hen. Bl. 130. 135.]

outlawry be reversed, for it is no record *ab initio*, yet a *respondens* *ouster* shall be awarded.

* [228. a.]

1. And. 30. N. Ben.
140. S. C. See the record of this, Novel En-
tre, title Det. pl. 32.
fol. 158. [Mo. 63.]
[Co. Lit. 128. Lutw.
40. 1514. 2. Mod. 367.]

Kelw. 96. 21. H. 7. 9.
3. H. 6. 14. Plow. 411.
Dier, 187. b. 19. E. 4.
9 b. 8. Co. 142. b. 5.
H. 7. 14. 9. H. 7. 9.
20. H. 6. 25. b. 22. H. 8.
B. N. C. 20. Reg. 75.
21. H. 7. 2. 20. E. 3.
Annuity, 33.

[1. Salk. 329. 1. Ld.
Raym. 274. 5. Com. Dig.
216.]

2. Keb. 279. Dy. 253,
254. Co. Lit. 128. 8. Co.
142. b. 4. 16. H. 7. 12. 11.
3. El. 184. a. 7. H. 6. 32. b.
9. H. 5. 1. 2. Yelv. 36.
22. Ass. 12. 2. Ro. Rep.
38. 4. H. 6. 13. b. Br.
Failer de Record, 3. 3.
Bulstr. 334.

Dier, 187. a. 23. E. 3.
23.

[See 3. Bac. Ab. 762,
763. *per totum*.]

+ *Tr. n. 16. Jac. B. R. [Cro. Jac. 484.] Ison v. Gray* accordingly adjudged not peremptorily, but that the defendant shall answer over.

Note, *East. 5. Car. In Cur' Ward'* on a grant between *† Lord Brooke and Varne* a jury appeared in court, and in giving evidence to them to find an office after the death of *Lord Brooke*, it was doubted whether an outlawry which is reversed can be given in evidence, and found in the office by the jury or not; and it was resolved by three Judges assising, that it may be found by the jury that there was such outlawry, and that it was afterwards reversed, although it cannot be pleaded. [21. Vin. Ab. 384.]

of it in certain, without making a *proferet* of it, and concluded, *judgment if he shall be answered*: and the plaintiff said, *nul tiel record*, and defendant *à contra*; and it was entered, and it was ordered the said defendant that he should have the record here on such a day &c. at his peril &c. and in the mean time the plaintiff removed * the record of all the plea and of the outlawry into *B. F.* by writ of error, and there assigned error, and had a *scire facias* upon it; and the error still undetermined, now in this Term the defendant brought into the Bench an exemplification under the seal of *B. R.* without any writ or other seal: and whether it shall be allowed now for the record, or whether he had failed of it, was much doubted: and some thought that he has failed of the record: and so it is if the record be reversed, for by the reversal it is made no record *ab initio*, although at the time of pleading it, it was a record &c. But the opinion was in this case that this † is not peremptory on the defendant, but that he shall answer over. Yet *quare* of this. And see *Trin. 35. H. 6. Rot. 424.* in attaint, the defendant prayed judgment of the writ because the plaintiff sued out another writ thereof returnable in this court and effoigned, and pending the said writ sued out this writ: and the plaintiff says *nul tiel record* in this form, *viz. the writ ought not to be quashed, because he says, that there is not any such record as the aforesaid defendant hath above alleged, and this he is ready to verify howsoever &c. as the Court &c. shall consider: and because the Justices here will advise upon the inspection and examination of the record by the aforesaid defendant above alleged, day is given to the parties aforesaid here until &c.* And this precedent was shewn by *Fylmer*, clerk. So note the entry above, of having the record at the day at his peril, is not formal when the record is vouched in the same court.

Ashton's Case.

(46) **RICHARD ASHTON**, esquire, for the fulfilling of certain covenants contained in a pair of indentures made between him and *Sir William Bavenport*, knight, concerning a marriage to be had between *Richard* his son and *Elizabeth* the daughter of *Sir William*, with whom he gave seven hundred marks, enfeoffed (before the said marriage had and solemnized) certain persons of certain lands to the annual value of twenty pounds, to the use of the said *Elizabeth* for the term of her life. And after the said marriage was had, the said *Richard* the father died, and then the said *Richard* the son died also; after whose death it is found by office, that the said *Richard* the son died seised in his demesne as of fee of the said lands whereof the said feoffment was made, and of other lands holden of the Queen by knight-service as of the Duchy of *Lancaster*, his heir within age. First, Whether the said *Elizabeth* ought to have dower of the lands of her husband, and also to retain the said lands whereof the feoffment was made to her use, because she was not his wife at the time of the feoffment made, and because the said feoffment * was not made of the lands of the husband, nor by the husband according to the statute of 27. H. 8. [c. 10.]. And the opinion of the counsel of the court was, that she shall be barred of dower. (47) Also, Whether she shall be dowable against the Queen of the lands of the said *Richard* her husband, because the said feoffment † is not found in the office which is, the title of the Queen. Also, Whether contrary to the said office, in stay of her petition of dower, it may be averred by the Queen that such feoffment was made to her for her jointure, when neither the said feoffment, nor any other covenant contained in the said indentures of marriage expresses that the said feoffment should be for, and in recompence of her jointure. Also, Whether the said *Elizabeth*, for the obtaining of her dower, shall be received to aver and prove by commission in the Court of Wards that the said feoffment was not thought of for her jointure, but that she shall be at liberty after the decease of her husband to demand her dower.

Feoffment by *A.* before the marriage of his son to the use of the intended wife for life, though not expressed to be for her jointure, yet is so within 27. H. 8. c. 10.

[14. Vin. Ab. 547.]

4 Co. 2. b. Ow. 33.

[3. Com. Dig. 133.]

10. El. 266. a. Dy. 248. a.

* [228. b.]

Plowd. 369. Dy. 97. b.
296. b. 2. Co. 96.

Dief, 146. 148. 317. a.

† Trin. 36. *Eliz.* [cited to another point Cro. Jac. 625.] *Smith and Littleton's Case* in the Court of Wards, by the two Chief Justices, if such matter be omitted in the offices, it ought to be found by *melius inquirend'*, and that it shall come in by averment. Lib. Popham. DYER, in the MS. of this case, thought that the wife shall not be barred, for it was not done in consideration of the jointure, nor was it done of the lands of the baron, nor by the baron according to the statute 27. H. 8.

GLOUCESTER.

Entered East. 8. Eliz.
Rot. 1373.

Where the issue is matter of spiritual cognizance mixt with a temporal matter, it shall be tried by a jury, and not by the ordinary, as avoidance of a church by resignation.

If the incumbent be promoted to a bishoprick the king may not present to the void church.

[Bend. 140. Moor. 61. and Dal. 74. S. C.]

Novel Entre, 4. Quare Impedit, 181. 32. H. 8.

48. a. 3. H. 7. 7. b.

44. 46. E. 3. 25. b. 32.

a. 11. H. 4. 37. B.

N. C. 494. 498. Br.

Quare Impedit, 47. 5.

Mar. 159. a. Dr. and

St. 226. 41. E. 3. 5. b.

7. H. 4. 25. b. 11. H. 4.

60. a. 76. 2. Inst. 358.

4. Inst. 357. 2. Rol.

Ab. 343. 2. Cro. 583.

3. Cro. 527. Br. Pre-

sentment, 61. 15. E. 4.

25. 49. Aff. 7. 40.

E. 3. 20. b. 6. E. 3. 9.

9. H. 6. 33. 49. E. 3.

18. a. 2. R. 3. Issue,

129. 1. H. 6. 2. 11.

H. 7. 18. Winch. 95.

1. Sid. 390. Vaughan,

24.

[2. Com. Dig. 14. 3.

Com. Dig. 171.]

Sir Henry Sidney *against* the Bishop of Gloucester and another.

(48) *QUARE IMPEDIT* was brought by Sir Henry Sidney, Knight, against the Bishop of Gloucester and one *Reve*, who is one of the chaplains of the Queen, who was incumbent of the church of *Cleve-bishop*, of the presentation of our lady the Queen, and the next successor to one *Parcuff* now Bishop of *Norwich*, the last incumbent of *Cleve*, and the Queen supposed that the benefice belongs to her by her prerogative, † because the benefice was void by cession, s. by creation of the incumbent into a Bishop; (which is not law as I understand, which my other companions also thought,) But the issue was joined in the plea upon the avoidance by the resignation of *Parcuff*, &c. But how this issue should be tried was doubted; but at length it was holden that it shall be tried by the country, and not by the ordinary. And so the *venire facias* issued to the sheriff of Gloucester &c. But in 5. *Ed. 4. brevi* [3. b. pl. 1.] it was doubtful upon the issue of avoidance by deprivation &c. And the reason which moved the Court to award the *venire facias* above was, because the principal part of the issue is upon the avoidance, which is notorious to the country, and the resignation which is spiritual is only evidence of it. Which see *East. 2. E. 4. fol. 1.* where the sheriff returned that he could not serve the writ against a parson of a church because he had resigned before the coming of the writ to him. And the like *M. 9. E. 4. fol. 52.* [49. a. pl. 7.] See more of this case *postea*, fol. [233. a. pl. 12.]

† *Memorandum*, That in *East. 24. E. 3. ex lib. Mri. Noy*, there is vouched a plea for a prebend in *Exeter* in which the lord the king claims to present, because a prebendary is created Archbishop of *Dublin*. *East. 46. E. 3. Rot. 7.* the lord the king recovers and presents. So *Trin. 24. E. 3. Rot. 68.* prebend of *Maffington*. And *Mich. 24. E. 3. Rot. 22.* the lord the king recovers against the bishop of *Lincoln* the said prebend. See for a good case *post. fol. 273. a.*

Trin. 3. Car. B. R. and entered *Hil. 22. Jac. Rot. 1164.* *Evans* and *Kiffin*, and *Atkins'* case [Noy. 93. Lat. 233. Palm. 457.], resolved by all the Judges, that if a parson or dean in *England* take a bishoprick in *Ireland*, that this makes the first church void by cession, and in the report several cases are put to this effect.

Mich. 19. Jac. C. B. This case was in question, s. a grant of the next avoidance to *I. S.* the incumbent is created bishop, the king presents by his prerogative, and in this case the Justices were of opinion that the grantee should have the next avoidance after by his grant: where it was not doubted but that the king shall have the presentation, for note, their reason for the grantee was, because this was the act of the law and the prerogative of the king which excluded him from the first presentation, and that prejudices no one. [3. Will. 232, 233. Wood's Inst. 37. 1. Bl. Com. 383.]

* Easter Term,
6. Queen Elizabeth.

• [229. a.]

(49) THE tenant of the king *in capite* by knight-service died seised, his heir being a feme covert, who had issue by her husband, and died within ten days after the death of her father, no livery sued; and this was found by office. The husband shall be tenant by the curtesy: and, Whether he shall sue livery or not, was doubted. But *per librum Gylle*, in the 35th of *H. 6.* he shall sue livery (a). And the writ of it was directed to the escheator, *s. that you deliver to him &c.*

Lands *in capite* by knight service descend to a feme covert, who dies without suing livery, her husband shall be tenant by the curtesy and sue it.
4 H. 7. 1. b. Dr. and St. 84. 1. Mar. 95. a.
1. H. 7. 18. b. Br. Livery, 67. 2. H. 7. 18. b. 8. Co. 172. N. B. 258. a. Dy. 235.

[(a) Tenure by knight service *in capite*, taken away by 12. Car. 2. c. 24.]
with the fruits and consequences thereof, is]

Chibborne's Case.

(50) IN *B. R.* this Term, in the case of *Chibborne*, it was moved for a doubt, whether the use or freehold of messuages in *London* pass at this day by bargain and sale made there by parol only without indenture or inrollment there made or not, by reason of the *proviso* contained in the statute of inrollments in the 27th of *H. 8.* [c. 16.] which in the first words seems to exempt all manner lands, tenements, and hereditaments in cities, boroughs, and towns corporate, but the words following, *s. wherein the mayors, aldermen, recorders, and other officer or officers have authority or have lawfully used to inroll any evidences, deeds, or other writings within their precinct or limits &c.* seem to declare the intent and meaning of the makers of the statute, that the inrollment shall be reserved to the cities, boroughs, &c. in such manner and form as was usual before, therefore *quære* well thereof: for the citizens of *London* take and use the statute above, otherwise, *s. that the bargain at this day and always since the statute hath been taken good there by parol only &c.* And according to this a verdict was given this Term at *Guildhall*; and notwithstanding that the *Chief*

Lands in *London* pass by parol bargain and sale without indenture or enrolment as before 27. H. 8. c. 16. by a *proviso* in the statute.
24 E. 3. 64. a.
Dier, 155.
Co. Magn. Chart. 675.
R. 133.
2. Keb. 34a.
5. H. 7. 49.
1. Inst. 81. b.

(50) Whether an use may be raised by parol only. Affirmed 2. E. 6. Rot. 36. cited by *POPHAM* in the argument of *Callart* and *Callart's* case. [Poph. 47. Cro. El. 344. Muor. 687.] *Hil. 35. Eliz. Rot. 355. B. R.* where many were of opinion against the judgment of *POPHAM* that an use shall not arise without deed. [Gilb. Uses, 53.—59. 87. Snep. Touch. 483. But now see 29. Car. 2. c. 3. §. 7. and §. 1.]

Justice * SIR R. CATLYN exhorted the Jury to give a special verdict, and the counsel of the parties agreed thereto, yet they gave a flat verdict upon the disseisin in the point. But in *Mich. Term* next, the opinion of the Justices of both Benches was, that the lands in cities &c. are at common law exempt from the act.

[Laws of London, 53.
3. Com. Dig. 540.]

Trinity Term, 6. Queen Elizabeth.

To an action on a bond to ratify and confirm an estate, it is a bad plea that defendant did ratify and confirm, unless he also shew it to be by deed.

7. E. 4. 6.
Dyer, 279. a.

4. H. 6. 5. b.

10. E. 4. 1. a.

Dyer, 174.

(51) THE condition of a bond was thus; that "where the obligees (being the husband and wife) have an estate for term of their lives of and in certain lands and tenements in *D.* by the demise and grant of *A. B.* and his wife; as it appeareth by an indenture thereof made bearing such a date &c. if the above bounden obligor and his heirs do ratify, confirm, and allow the said demise and grant at all times hereafter, and permit and suffer the said obligees and every of them to enjoy the premises according to the said indenture, without let or disturbance of the obligor or his heirs; and also if the said obligor and his heirs do make such further assurance in the law as the obligees shall devise &c. that then &c." The obligor pleaded "that he at all times after the making of the writing hitherto hath ratified, confirmed, and allowed the aforefaid demise and grant, to wit, at *D.*" and pleaded further, "that he had permitted and suffered the obligees during the life of the husband, and since his decease the wife to enjoy &c. and besides that the obligees have not devised any further assurance in law in and for the confirming the premises &c." and upon this the plaintiff demurred. And note that the wife, who was one of the obligees, was married to another, who were the plaintiffs in this action of debt. And by the better opinion the plea is not good, but he ought to have pleaded a confirmation in deed by writing; and therefore afterwards the party confessed the action, the demurrer in law being relinquished in *Michaelmas* next.

* (52) A MAN seised of four acres of land holden in socage, had a charter concerning all the said four acres, and by his last will in writing he devised three of the said acres to his youngest son and his heirs in fee, and the fourth acre he devised to his wife for the term of her life, remainder over to a stranger in fee, and died; and the wife got the charter by finding it, and entered into the acre devised to her, and the son entered into the three acres devised to him: and against him the wife brought a writ of dower, and made her demand of the third part of the three acres: and the tenant pleaded the detinue of the charter in bar, and that if she will deliver it, he is, and at all times has been, ready to render dower. And she shewed the case as above by way of replication, and to this a demurrer. And it seems that the plea above does not lie in the mouth of any one except the heir of the husband, nor for any land but for land descended, and not purchased, nor for the heir although he be vouched, where he comes in as tenant by receipt upon default of tenant for term of life, if he be not tenant of the land; for he cannot say that he has been always ready to render dower if &c. And it does not lie in the mouth of the guardian in chivalry, for he cannot have a writ for the detinue of the charters of the heir &c.

(53) Also the plea is not a bar for more land than the charters concern, by 22. H. 6. [42. b. pl. 21.] where it is said by NEWTON, that the cause in law of such bar is, because it may be that the charters upon being seen may make matter to bar the dower demanded; but of other land which the charters do not concern, the demandant is dowerable, and the tenant shall plead another bar. Also the certainty ought to be alleged in such case, unless they are in a box, chest, and bag, sealed or locked &c. And note that the defendant in the dower above is not named heir by the demandant, nor does he enable himself to have the plea as heir, and then the Court is indifferent to judge whether he is heir or not: as if one who is incumbent be named in the *quare impedit* Clerk, the Court takes him as a disturber, and not incumbent, if he does not enable himself as incumbent, or parson imparsonnee. (54) And note, a default was found in the conclusion of the plea of the tenant, s. because he says that he is yet ready to render dower, and does not rely

East. 4. Eliz. Rot. 917. To a writ of dower none may plead detinue of charters, but the tenant in possession by descent as heir to the husband. Nor is the plea good for more land than the charters concern: and they should be shewn in certain unless sealed up, or in a box.

Co. Lit. 39.
8. El. 248. a.

Co. 44. a.
B. N. C. 421.

14. H. 4. 33. 6. Co. 75.
21. E. 3. 8. 4. E. 4. 7.
Dier, 37. 7. E. 3. Dower,
101. Perk. 71. 360. 9.
Co. 18. a. 36. H. 6. 7.
22. H. 6. 16. a. 2. H. 7.
6. a. 2. H. 6. 42. 16.
E. 3. Dower, 57. Perk.
358. 4. H. 7. 10. a.
8. 10. 17. E. 3. 55. 50.
58. N. B. 9. 22. H. 6.
42. b. Voucher, 93.
7. E. 2. Dower, 150.
10. E. 3. 49. Dower,
122. 3. Co. 38. a. 33.
H. 6. 51. Plow. 70. b.
357. 6. E. 4. 15. 3.
H. 6. 19. b. 18. H. 8.
1. a. 1. E. 3. 12. 9. Co.
110. 2. H. 7. 6. a.
Plowd. 85. a.

[2. Bac. Ab. 143, 144.
Bul. Ni. Pr. 127, 118.]

[Mo. 81. Com. Dig.
Tit. Pleader (3. l. 9.).]

22. H. 6. 16. 9. H. 6.
35 Repleader, 39. Di-
er, 140. b. 184. 272.
Plow. 138.

Trin. 30. H. 6. Rot.
551.

[Raft. Ent. 231. a.]

again upon the condition, s. if the demandant will deliver the charters, according to the ancient precedent in the book of entries; so the dower is confessed; but the printed book has not this relying again, [*lib. Intr.*] fol. 109. And at length, s. on the last day of this Term, judgment was given for the demandant.

* [230. b.]

* Wright's Case.

The judgment in trea-
son for clipping the coin
is to be drawn and
hanged only.

Br. Treason, 91. Pult.
224. Stamf. 182. 3. Inf.
17.

[2. Hawk. P. C. 630,
631.]

(55) **MEMORANDUM**, that it was agreed among the Judges this Term, that the judgment in treason for clipping the coin of *England* is no other but to be drawn and hanged; and so judgment was given in *London* by JUSTICE SOUTHCOTE in this Term against *Wright* and others.

Alford against Eglishfield.

If a servant make a bill
acknowledging the pur-
chase of goods for his
master's use, and bind
himself to pay, but do
not seal the bill, debt
will not lie against him,
but case on the *assumpsit*.

8. E. 4. 11. Dr. and
St. 137. 11. H. 4. 28.

a. 11. E. 4. 6. 4. Br.
Administ. 13. Con-
tract, 41. 27. H. 8. 23.

b. 21. H. 6. 22. a.
Plow. 11. a. Ro. Rep.

77. 3. Keb. 72.

[15. Vin. Ab. 309, 310.
a. Vern. 146. Yelv.

137. 2. Str. 955. 1.
Term Rep. 172. 674.]

(56) **NOTE**, by the opinion of the Justices of the Bench, that if a purveyor, factor, or servant, make a contract for his sovereign or master, for fat beasts, for a certain sum of money, and make a bill of receipt for the beasts to the use and behoof of the sovereign or master, and besides, by the same bill bind himself to payment at a day certain, but do not seal the bill, this is not such a contract as shall charge the purveyor or servant by writ of debt counting upon a buying, but an action on the case will serve on this occasion upon an *assumpsit*. And this between *Alford* and *Eglishfield*. See of the undertaking of the master for the debt of the servant &c. *East*. 10. *Eliz.* fol. [272. pl. 31. *post.*] And of the undertaking to warrant a term of years, *M.* 15. fol. 328.

† *Goodbaylie's case*, *Micb.* 6. *Jac. B. R.* If a servant by express words do not bind himself to payment, if it come to the use of his master he is not chargeable at all; and the servant ought to plead that it came to the use of his master.

The lord by chivalry re-
leases to his tenant ren-
dering a hawk; this new
reservation is void; and
tenure by fealty conti-
nues.

(57) **THE** lord by knight-service by a deed bearing date the 36. H. 3. s. the son of King *John* (note of a date given to a deed at that day), gave, granted, released, and confirmed, to the tenant and his heirs, his service in fee of

Chelle,

Chelle, which he held of him by the service of one knight's fee, to have and to hold to him and his heirs, of the said lord and his heirs, freely, quietly, and in inheritance for ever, rendering thereof yearly to him and his heirs one hawk at the Feast of *St. Peter ad vincula*, with a warranty of the service, for the service aforesaid. Whether the entire tenure be extinct by this deed or not, *quære*. And it seems by the better opinion that it shall not, but that socage tenure is reserved, and no other service shall be done except fealty: and the new reservation of the hawk is void, because the land was not given by the deed, and the estate of the tenant continues.

Chud's case in the court of wards in the county of Suffolk. Date of the deed in the time of H. 7. Perk. 361. 126. b. 663. Co. Lit. 305. b. 9. Co. 8. 142. Br. Reservat'. 4. 8, 9. E. 3. 66. 11. 31. 36. 39. Aff. 30. 3. 3. 26. Aff 7. Lit. 350. 539. Dy. 52. Litt. 122. b. 7. E. 4. 25. a. 9. H. 6. 9. a. Mo. 631.

[4. Bac. Ab. 340.]

(58) **I**N *B. R.* the Archbishop of *C.* recovered in an action of debt by bill of *Middlesex* against one in the custody of the marshall by confession of the action, and a writ of execution was awarded upon it. And upon a *capias ad satisfaciendum* it was returned *cepi corpus*, wherefore he was committed to the *Marshalsea* in execution, and brought a writ of error in *B. R.* and all this was * done in this Term. And the error was in this, that there was no warrant of attorney for the plaintiff entered, and therefore by the opinion of the Justices of both Benches, the judgment was reversed, although it was strenuously prayed for the plaintiff that the Justices would suffer the plaintiff to enter a warrant of attorney, because all was done in one and the same Term, and the record rests yet in their breasts &c.

Judgment reversed for want of plaintiff's warrant of attorney, though the writ of error and judgment were both in the same Term.

* [231. a.]
F. N. B. 21. f. Dier, 195. b. 1. Rol. Abr. 250. 38. E. 3. Judgment, 78. 1. Rol. Rep. 305. Dier, 162. 108. 162. b. 1. H. 7. 13. b. 20. El. 363. a. 16. El. 330. a. 41. E. 3. 1. 2. R. 3. 1. 8. Co. 157. a. 13. H. 4. Error, 91. 1. Rol. Abr. 290. (1.) 5. [See ante, 225. a. pl. 34. Dougl. 115.]

See otherwise in *C. B. ante*, 225. *pro defendente*. If plaintiff in his writ of error does not prosecute his writ the Term that the record is removed, or if the record be not removed on the same day that is limited by the writ of error, then a warrant of attorney ought to be entered by the Court, and the judgment shall not be defeated.

Michaelmas Term, 6. and 7. Queen Elizabeth.

Beauprè against Leedes and Others.

A grant of the next avoidance between the statute of dissolutions and the surrendering of the abbey in consequence of it, is void, for the saving in the act does not extend to future titles.

[Benl. 139. S. C.]

Ben. in Keilw. 211. S. C.

P. 5. Eliz. Bendl. pl. 16. 2. Co. 49. a. 10. 55. b.

E. 4. 7. Plow. 484. Dier, 252. Plow. 207. a. 1. 10. 47. a. 2. Co. 49. 27. H. 8. Bro. 52. Plow. 563. b.

(1) THE Abbot of *Ramsay*, with the assent of his convent, late patrons of *Upwall* in the county of *Norfolk*, in *August*, in the 31st year of *H. 8.* and *A. D.* 1539, which was after the statute of the assurances of the abbeys &c. made in the same 31st year of *H. 8.* [c. 13.] and before the dissolution of the said monastery, which was in *November*, in the same year granted the next advowson of the said church to *Sir Edward Montague, Knight*, late *Chief Justice* of the common pleas, who granted it over, and at last it was conveyed to one *Leedes*, against whom *Beauprè* the patentee of the fee-simple of the said advowson, granted by *E. 6.*, brought *quare impedit* both against the Bishop and incumbent; and by pleading to rejoinder the case above appeared; and in the rejoinder the saving in the said statute is pleaded with this averment, that the said *Leedes* is not, nor was, nor can be understood to be, any such person as by or in the act aforesaid is excepted: for the exception in the saving is of those who pretend to be founders or donors of the abbeys, or their heirs &c. And whether the said grant shall be avoided by reason of the said statute, the words of which are that the abbeys and their lands &c. shall be deemed &c. *in the state and condition as they now be* &c. (2) And by the opinion of all the Justices, the grant was holden void to bind the King; and although there had been no saving, yet for tithes and interests then *in esse*, and present at the making of the act, they are saved by the first words, "*state and condition*," and the saving cannot be intended for future titles. And afterwards a writ of error was brought by the defendant after

(1) The plaintiff had judgment to recover for, *in the state and condition*, which are the words of the statute, have relation to the 28th day of *April*, an. 31. *H. 8.* So that the abbot cannot make any grant after, for if a feignory was in the abbot, and the tenancy escheated after this day, the king shall have it. So land purchased by a villein of the abbot, the abbot enters after the statute, but land purchased by the abbot after the statute the king shall not have. See the statute of enrollments, 27. *H. 8.* [c. 16.] that it shall have relation to the date. 18. *H. 6.* [14. b. pl. 3.] a re-summons in formdon, the words are "*in the same state that they then were*," and the statute *de advocacione ecclesiarum* [13. *E. 1.* ft. 1. c. 5.] such action as &c. And the said saving does not aid him, for this has relation to grants made at the time of the act. Bendl. fol. 139. c. 195. [1. Term Rep. 660. Plow. 79.]

judgment

judgment, and no error was assigned in the said point adjudged, but in other trifles. And after a long continuance of Terms, the writ * of error was discontinued. A like matter as above was entered *Mich.* 16. of the present Queen, between *† Banks* and the *Bishop of Gloucester*, and *Jones*, for the church of *Wormington* in the county of *Gloucester*, and judgment as above: but *JEFFREY, Serjeant*, and *MOUNSON, Justice*, hesitated for leases future after the act, if the ancient rent be reserved. *Quare bene.* See *postea*, *M.* 16. of the present queen, fol. . the same case.

Plow. 207. a.

Sir John Barkley against Phillips.

(3) **I**N a writ of partition by *John Barkley, Knight*, against *T. Phillips*, the jury were of the visne of *Stoke Denis*, and at *nisi prius* the defendant challenged the first juror, *s. Sir James Fitzjames, Knight*, for the hundred; but the defendant, being asked in court, in what hundred *Stoke* was, answered that he would not shew this, for it belonged to the plaintiff to shew it. But the Justices over-ruled this against the defendant, and then the defendant said, that it was a liberty of itself, and out of any hundred, so it had no hundredors sufficient in the panels &c. and this challenge also the Justices disallowed: and then he said that *Stoke D.* was a hundred by itself, within which there were no sufficient hundredors; to which the plaintiff said, that it was not an hundred by itself, but was within the hundred of *Tinkrel*: which issue was tried against the defendant immediately by two triors; upon which they proceeded to take the inquest, which was found against the defendant. But upon this matter, the defendant prayed that the Justices would seal a bill to assign these matters for error, and this was granted before the taking of the inquest. And afterwards judgment was given for the plaintiff and execution accordingly next Term,

He that challenges for the hundred, must shew in what hundred the place is, and not drive the other party to shew it.

14. H. 7. 2.

See Inst. 157. a. For all challenges to the hundred, where it is said that in all pleas there ought to be of the hundred where the cause of action is: but in personal actions it is now sufficient if there be two, by stat. 27. El. c. 6.

[See note (b) to fol. 25. a. pl. 156. ante.]

Dier, 266.

Br. Challenge, 11.

9. Co. 13.

Sir Edward Walgrave's Case.

(4) **A** QUESTION was asked by *SAUNDERS*, Chief Baron of the Exchequer, for the widow and executors of *Sir Edward Walgrave, Knight*, *s.* whether they shall be charged

Within the six weeks after conviction on 1 El. c. 2. defendant died. Whether his executor shall be charged with the forfeiture, since by § 12.

he might have elected to suffer imprisonment in lieu thereof.

Ante, fol. 203. pl. 72.
9. El. 262. Br. dett.
159. 19. El. 358. 8.
El. 254. 8. H. 5. 2.
5. Co. 22. a. 5. Mar.
260 b. 30. H. 6. 24.
[1 Hawk. Pl. C. 14.]
[Of disjunctive Condi-
tions see 1. Bac. Ab.
432, 433. Dougl. 16.]

charged in the exchequer, for the forfeiture of one hundred marks, for the hearing of mafs, eftreated thither out of *B. R.* upon the said *Sir Edward*, inasmuch as the said *Sir Edward* died within the weeks &c. so that now by the act of God his body cannot sustain imprisonment of six months in lieu of the forfeiture which he had election to suffer. And this question depends upon the words of the statute of the first of the present queen [cap. 2.].

Note, that the imprisonment for six months was in lieu of forfeiture, which he had the election of, which is now taken away by the act of God; so it seems that the forfeiture remains.

* [232. a.]

If the ordinary has notice of an action brought against him on an intestate's bond, he must not dispose of goods in his hands unless he reserves assets to satisfy that also.

2. H. 4. 21. Br. Execut.
172. 24. H. 8. B N C.
233. Dier, 28. 80. a. Plow.
279. a. 20. H. 8. 32. a. 9. E.
4. 11. 12. Dr. & Stu. 77.
21. H. 7. Kelw. 74. 21. E.
4. 21. 5. H. 7. 27. 11 H. 7.
12. 20. H. 7. 5. 41. E. 3.
Execut. 68. 22. E. 4.
Execut. 39. 1. Ro. Abr.
926. Dr. & Stu. 77.
[Went. Exor. Supplem.
37. 1. Term Rep. 690.]

*(5) [F an ordinary have goods of one who died intestate in his hands by sequestration to the value of twenty pounds, and an action of debt for twenty pounds is brought against him as ordinary upon a bond made by the intestate, the ordinary having notice of this, shall not dispose of it, or administer any part of the said goods to other creditors at his pleasure, but is bound to satisfy the debt first for which the action is brought against him: and this by the opinion of the JUSTICES in this *Serjeant's Inn*. And this question was moved by the Bishop of *London*.]

So it was adjudged *Hil. 36. Eliz. C. B.* But *East. 25. & 30. Eliz.* this difference was taken; where before the return of the first writ the executor confesses the party's action, there is no remedy: *Secus*, if the confession be after the return of the first, 9. E. 4. [14. b. pl. 10.] 15.

Where there is fine and ransom, the ransom must be at least treble the fine.

[Jenk. c. 5. c. 96. S. C.]
Co. Lit. 127.
[See 23. H. 8. c. 3. §. 7.
1 Hawk. P. C. 633. 4.
Bl. Com. 380.]

Sir Edward Norton's Case.

(6) *NOTE*, when one is to make fine and ransom, the ransom shall be treble the fine at least: and this by the opinion of all the JUSTICES in attaint in *Essex* against *Sir Edward Norton* knight, in which the plaintiff was nonsuited,

The Case of Leases of the Duchy of Lancaster.

(7) **MEMORANDUM**, That in this Term the question in the Duchy Court for leases in reversion granted by Lord Paget Chancellor of the Duchy of Lancaster in the time of Edward 6. in which the usual proviso of, *if any one is willing to give more, without fraud, or bad faith, &c.* was omitted and left out. And for this, it was supposed that the leases, by the ordinances of the Court made in the 20th year of H. 6. should be void. It was resolved by the Justices who were appointed for the discussion of it upon great consideration: s. That the leases were sufficient and good enough, although they were excepted out of the acts of confirmation of letters patent in the 1st year of Ed. 6. [c. 8.] & 7. [c. 3.] which left them in the same state as they were in before, for the tenor of the leases was, *that the lord the king with the advice and assent of the council of the Duchy of Lancaster demised and granted &c.* although the truth was to the contrary, and by the ordinances this is one of the exceptions, s. if the leases are made by the council of the Duchy, although the proviso be wanting, the lease shall be good. But of leases made in the Duchy-chamber at Westminster of the lands and possessions newly annexed to the Duchy, lying and being within the county palatine of Lancaster, and sealed with the seal of the Duchy-chamber at Westminster, where by the words of the statute of 37. H. 8. c. 4. [c. 16. 27. H. 8. c. 11. §. 6.] such lands and possessions ought to pass under the seal of the county palatine, and not by any other seal, or otherwise, it seems by the opinion, that they are void by the intendment of the statute, although they are not so fully expressed in the statute. (8) And this is more clear than the case which was in the Court of Augmentations * in the time of Hil. 8. E. 6. in debate, for an office of the same court which was granted by the king under the great seal of England for term of life, where by the act for the erection of that court 27. H. 8. [c. 27.] the words are, *that all grants of freehold only, or for years, of the possessions within the survey of it shall pass under the seal of that court* without other negative words &c. And *quære* whether the lands of colleges, free chapels, and chauntries within the Duchy by a proviso in the act of the dissolution of colleges and chauntries in the 1st year of Ed. 6. [c. 14.] may be leased by the chancellor

Leases in reversion by the Chancellor of the Duchy of Lancaster without the usual proviso "*si quis plus dare voluerit*," are void by the ordinances of that Court: but where in such a lease was said, "*the King with the assent of the Council of the Duchy leased*," (although false) it is good, for leases granted by the Council are excepted by those ordinances.

4. Inst. 209.
Plow. 212. b. 122.
27. H. 8. cap. 11.
Rast. Clerks of the Signet, 1.

Plow. 222. a.

[4. Com. Dig. 394.]

Mo. 246. 245.

22. H. 7. Cro. 90.

Plow. 218. 11. H. 486.

Ante, 50. a.

* [232. b.]

32. H. 8. 51. a.

[Vide ante 50. a. pl. 1.]

2. Inst. 555.

4. Co. 108.

Dier, 357.

and council of the court without privy seal or other warrant, and if for more years than 21, and also in reversion, for the words of the act [§. 35.] are, *that they shall be within the survey and order of the Court of the Duchy in such manner and form as other the premises be assigned or appointed by this act to be in the survey and order of the Court of the Augmentations and revenues &c.* which premises by the said act [sect. 23] *shall and may be granted and letten to farm by the Chancellor, officers, and ministers of the said Court in such manner and form as other lands &c. appointed to the said Court of Augmentations &c. are to be granted or letten:* and by the letters patent of erection of this Court of Augmentations and revenues, the Chancellor and officers are restrained from making leases beyond 21 years, and also of reversions &c. Wherefore &c.

Harrison against Worley.

If an infant bind himself in a statute staple, he must bring *audita querela* during his nonage, for after full age he shall not have it, [Benl. 80.] }
Mo. 75. } S. C.
1. And. 25. }
1. Keb. 89. 1. 8. H. 6. 30. b.
Dy. 249. b. 2. R. 3. 20. a.
18. E. 4. 13. b. 12. H. 7.
Cro. 10. 17. E. 3. 76. Reg-
ister 199. 20. E. 3. Au-
dita Querela, 26, 27. 9.
18. E. 3. 39. 5. & 29.
15. E. 4. 5. 9. 10. Co.
30. b. 43. Infant 6.
3. El. 201. a. { which see
and Co. Lit. 380. b. 1.
Bac. Ab. 193. 3. Bac.
Ab. 141, 142. 1

(9) *AUDITA Querela* is brought this Term in the Chancery by *Harrison* against *Worley* to avoid a recognizance in the nature of a statute staple made by him whilst within age. And now he is of the age of 23 years. And whether it lies for him or not, was much doubted: and notwithstanding the opinion of FITZHERBERT in his *Natura Brevium* [fol. 238. K.] in the declaration of *audita querela*, it was holden by several that it does not lie, but that he ought to have brought it within age, so that by inspection of the Court his age might be tried. And of this see *T^m 13. E. 3. 2. & 4. H. 8. E. 3. 8. & 20. E. 3.* which is vouched in the note in *audita querela* in the printed *Register* [149. a.] and fol. 150. where the form of a writ brought by an infant appears, “that if it may appear to the Justices that he at the “time of the recognizance being made was, and yet is within

(9) *East. 4. Jac. B. R.* entered *Hil. 2. Jac. B. R.* Rot. 1040. *Randall v. Walle*, [Noy. 16. Jenk. 322. Cro. Jac. 59. & Yelv. 88.] *Randall* an infant acknowledged a recognizance of statute staple to *Walle*, and within age brought *audita querela* in *C. B.* and there by inspection was adjudged within age, and a *scire facias* was awarded against *Walle*, and the sheriff returned a *nihil*, and upon judgment that the recognizance should be annulled, *Walle* brought error in *B. R.* because judgment was given before two *nibils* returned, and because a *scire facias* was awarded, where it ought to have been a *venire facias*: and pending the error, *Randall* came to full age: and afterwards for the errors judgment was reversed; and now he brought *audita querela*, and prayed to have advantage of the first inspection; and to this it was demurred: and by all the Court, he cannot now have an *audita querela*, for now the Justices ought to judge by their own inspection, yet no judgment was given or entered.

† Co. Litt. 231. 360.

“age,

"age, then having heard the complaint &c." So he ought to be within age at the time of the writ brought. Yet *M. 6. E. 3.* [39. a. pl. 14. &] in fol. 280. in the year lately printed, it seems otherwise for the present time. But *Eaft. 7.* of Queen *Eliz.* it was ruled by the opinion of all the Court, that the writ above does not lie, and this in the Bench.

* *Ap-ricc against Rogers.*

(10) **I**N replevin by *Ap-ricc* against *Rogers*, he made conuſance as bailiff to *Sir Walter Denys* knight, for certain rent of grain, ſuppoſing that the late prior of *Bath* in the county aforeſaid, and his convent, by their deed indented at *Bath* demiſed the ſite, and all the demefnes of the manor of *W.* in the ſame county to the ſaid plaintiff for term of life rendering the ſaid rent of corn; and that afterwards the reversion of the ſaid ſite and demefnes and the reſidue of the manor came to the King by the diſſolution of the ſaid priory. And afterwards the King by his letters patent of the Court, and Seal of Augmentations demiſed and granted the manor aforeſaid with the appurtenances to the ſaid *Sir W. D.* for the term of 21 years, wherefore he as bailiff to *Sir W.* made conuſance for the rent of corn in arrear. And the plaintiff prayed *oyer* of the letters patent of the leaſe, and had it; In which it appeared that all rents, ſervices, profits, and hereditaments of the ſaid manor were by expreſs words leaſed, but no expreſs mention of any reversion was made or any recital of the leaſe of the ſite and demefnes aforeſaid, but a rent of ſeventy-four pounds was reſerved to the King upon the leaſe of the manor &c. of which there is not a word in the conu-

* [233. a.]

SOMERSET.

A prior and convent made a leaſe of the ſite and all the demefnes of a manor for life, rendering rent. The king after the diſſolution made a leaſe of the manor for years *per nomen manerii*, the rent and reversion of the demefnes paſs. Pleading that the prior and convent of *B.* demiſed at *B.* the manor of *W.* for life is bad, for neither attorney nor a corporation can make livery by the view.

[Bent. 24.]

[An. Bend. 16.]

12. H. 7. Cro. 18.

B. N. C. 350.

3. H. 7. 16. a. 26. Aff. 6. c.

55. Co. 4. 35. b. 46.

1. Co. 45. a.

(10) In the report at large—by *WESTON, BROWNE, and DYER*, the abbot alone may make livery, for only the aſſent of the convent is required, which is proved by the indenture. And by *DYER* and *WESTON*, the abbot alone may make livery within view. *BROWNE contra*, for he ought to make livery according to the deed, *s.* on the land, and an attorney cannot make livery within view; to which *WESTON* agreed: [Co. Lit. 48. b. 52. b. 2. Bac. Ab. 484. 1. Wood's Conv. 560. 2. Black. Com. 316.] But by *DYER* and *WESTON*, although livery be made within view, yet the leaſe ſhall be pleaded to be made where the land is, for it is no livery nor leaſe until the leſſee hath entered, and if he die before entry the leaſe is void: and becauſe he demiſed at *Bath* it is not good; but by *BROWNE*, if he had pleaded by indenture made at *Bath* they demiſed, this would have been good by indent. By *CARUS* and *DYER* if it had been pleaded, that the abbot and convent at *W.* demiſed it would not be good, for being out of the houſe of their foundation, they are not a convent, nor can be aſſembled ſo as to be a chapter, but this ought to be pleaded generally without putting any place, as all eſtates of freehold are to be pleaded.

fance

Perk. 14. b.

[15. Vin. Ab. 228. 2. Com. Dig. 532. Shep. Touch. 86. 89.]

6. Co. 56. there for in the word manor all estates are included.

38. H. 6. 34. b. 18. E. 3. 50. a. Roll. Contin. 344.

[See Ld. Treby's note to pl. 10.]

Ben. 129. Bp. Grants, 150. B. N. C. 269. 35. H. 6. 27. Dier, 141. a.

sance aforesaid. And to this the plaintiff demurred in law, whether the rent of grain, or the reversion of the site and demesnes passed from the king *by the name of the manor, only.* (11.) And by the better opinion the reversion passed by the name of the manor &c. But there was a default in the plea, s. because the demise for term of life of the site of the manor of *W.* was alleged to be made *at Bath*, which could not be by livery in deed, or in law, s. by the view of the abbot and convent, although *W.* be within view of *Bath*; it would be otherwise of a lease for years. But CARUS held strongly that *at Bath* should be expounded kindly and favourably, s. that the indenture of lease, and the assent of the convent, were at *Bath* &c. But according to the opinion of BROWNE and DYER the sense of the sentence cannot be so taken, wherefore the plaintiff had judgment to recover.

Entered East. 6. El.

Rot. 1373.

The archbishop of Canterbury grants a dispensation to one notwithstanding he should be created bishop, to hold in commendam for 3 years, this is good without inrollment in any court according to 5. H. 8. c. 21. but only in the re-

Parkhurst's Case.

(12) **J**OHAN Parkhurst now bishop of Norwich was parson of *C.* in the county of Gloucester, and before he was created bishop he obtained a dispensation of the archbishop of *C.* metropolitan of England in the time of the now Queen to retain the said benefice in commendam notwithstanding that he should be advanced to any bishoprick within the realm for three years, viz. from the Feast of St. Michael

Hil. 18. Jac. Rot. 3072. Woodward and Manwaring's Case. [Palm. 478, 479.] These points resolved, 1st. That the acceptance of a bishoprick in Ireland makes a cession of a church in England. 2d. That notwithstanding the word *commendam*, yet being "*to retain*" he holds in title notwithstanding. 3d. That the dispensation for six years is good, and during that time he continues full incumbent, not to make him parson for six years, but in such manner that during this time the canon does not meddle with him, and for this if during the six years he resign, the church is void by resignation. 4th. It was a doubt among the Judges whether the dispensation for six years serves the turn of the King. *Vide fol. sequente.* [See *Rex v. Bp. of London and Dr. Birch*, 1. Ld. Ray. 23. and the books there cited, and 3. Wils. 230.]

Hil. 22. Jac. Rot. 1164. and adjudged Trin. 3. Car. B. R. Evans and Kiffin's Case, *Vide ante*, fol. 228. b. [in *margin*.]

Hil. 4. Eliz. between Armiger and Holland, [4. Co. 75. Cro. El. 542. 601. 690. Mo. 542. S. C. but not S. P.] A difference was where the church which was in commendam was within his own diocese, and where not; for in the first case the dispensation does not avail, in the other it will.

HEMDEN, Serjeant, in the argument of *Evans's Case*, Tr. 3. Car. [Palm. 465.] affirms that this case of *Parkhurst* is more full than the record, for by that it appears, if the king grants to a person to retain in commendam for six years, and within the six years the parson resigns, by this the turn of the king is served which accrues to him by the cession if it was a cession.

The Case of *Commenda*, Davis's Rep. fol. 185. which proves that by virtue of the dispensation he continues in his benefice until he is created, and therefore afterwards he may take a faculty to hold it, and good,

in the year of our Lord 1560, until the same Feast which should be in the year 1563; but the dispensation was not enrolled in the chancery according to the words of the statute of 25. H. 8. [c. 21. §. 6,] nor in any court of the Queen,* but only in the registry of the archbishop. And before the said first Feast of *St. Michael* he was made and created bishop, and afterwards he resigned the benefice. Whether this be good, or not, was in question, in evidence before the Justices of *nisi prius* upon an issue, whether it was void by the resignation of the said *John P.* or not, in *quare impedit* by *Sir H. Sidney*, fol. [228. b. ante.] and the issue was found with the plaintiff, *s.* that the church was void by the resignation &c. and judgment was entered in this Term.

gistry of the archbishop, and the church is void by his resignation within the three years, *Hob.* 156. *Davis* 77. *Mo.* 900. 902.

* [233. b.]

28. H. 8. c. 16.
Raff. Dispensation, 1.
B. N. C. 116. 498.
Dr. & St. 126.
Dier, 159.
Moor 446.
1. Sid. 390.
[Gibbs. Codex, 913. 915.
Watts. Cl. L. 22. 75. 87.
and from 202. to 208.]

(13) **A**LEASE for eighty years was in question in the chancery, made by the free chapel and college of *Windfor* under their common seal, but the dean or warden himself was not a party to the lease, but one who was appointed for his *locum tenens* and deputy in his absence, because it exceeded the number of years that were the usual course of leases before this: and for the avoidance of the lease a statute or ordinance of the college was examined for the authority of the *locum tenens*, or deputy, the tenor of which follows: *Item statuimus quòd si custos rebus suis familiaribus aut negotiis propriis à dictis capellà et collegio absente impofterum se disponat per octo dies continuos seu amplius quandocunque, quòd antequam recedat ab eis unum de canonicis ibidem residentem quem eligendum duxerit, suum locum tenentem in capitulo constituat coram canonicis residentem tunc ibidem, qui eo absente dicti custodis in omnibus exerceat et gerat officium in personas & collegium memorat.* And Whether by this last word *collegium* all the possessions of the college are comprehended, or not, was the question. And by the opinion of all the Justices of this Inn it comprehends only the site and circuit of the territory of the college at *Windfor*, for this word (college) is once mentioned before, and there neither the possessions nor the persons of the college are intended, but the place where the college is situated only. Also the word (*eis*) has relation to *capellum et collegium* &c. wherefore

The dean of the college of *Windfor* may by their statutes in his absence make a deputy with power in omnibus exercere officium suum in personas et collegium memorat; this power does not enable him to make a lease of their land, though the rest of the chapter join, and it is under their common seal; for the word *collegium* extends only to the site of the college, not to their possessions.

[Jenk. Cent. 5. c. 97. S. C.]
[See supra, 145. b. pl. 65.]
[Wood's Inst. 30. W. & L. Cler. L. 475.]
4. Co. 108. b.
11. H. 4. 84.
Davis, 47.
2. Roll. Rep. 110.
Dier, 64. a.
Br. Exchange, 25. 28.
18. 22. 39. E. 3. 27. 8.
21. 8. H. 8. Cro. 139.

fore

29. Aff. 55. 8.

fore &c. And see + 29. *Lib. Aff.* 33. rent granted to be received of the abbacy or monastery &c. the site only shall be put in view.

An indictment in a court leet or torme for striking without bloodshed is bad. The steward may fine for such striking *sedem Curia*. Whether a leet may be prescribed for out of *Michaelmas*.

7. 31. H. 6. 12. 11. Kelway, 66. b. 2. Inf. 72. 3. Cro. 710. 8. H. 7. 4. Cro. 148. pl 26. Kitchen, 63. Dier, 211. B. N. C. 69 38. H. 6. 7. a. 6. H. 7. a. a. Litt. 98. b. Palm. 544.

[4. Com. Dig. 174. 175. 160. Wood's Inst. 481. 483.]

22. E. 4. 23. a. 1. R. 3. 1. 8. E. 4. 5. 4 H. 6. 10. a. 2. H. 7. 10. b. 8. Co 41. b. Crompt. Just. P. 103. Dier, 13. b.

[1. Com. Dig. 164. 1. Hawk. P. C. 265. Wood's Inst. 482.]

* [234. a.]

(14) **T**HE steward of a leet imposed a fine of forty shillings upon one who made an assault only upon another there in view and presence of the Court in disturbance and contempt of the Court, and to the annoyance of the people there; and for the fine a distress was taken, and a consuance made by the plaintiff of *Sir John Seintleger*, and a prescription in the usage so to do: and also a prescription, in a certain court within his manor there, called a Court of View of Frankpledge, to be holden there once in a year at the pleasure of the lord, and this court was holden out of the months of *Easter* and *Mich*. *Quere*, for upon the consuance made for the manor the plaintiff demurred in law. But clearly an * indictment of assault and battery there found without bloodshed is not good; for such indictment found before the sheriff in his tourn was adjudged void, because it did not contain that blood was drawn, *H. 13. E. 4. Rot. 10.* among the pleas of the king in *B. R.* by **LORD CATLYNE**.

Bonner's Case.

The bishop's chancellor may bring in the certificate under 5. El. c. 1. § 9. of refusal to take the oath prescribed by 1. El. c. 1. A *Lite bishop* so certified by the addition of *doctor* and in *boly orders*, good. Though the indictment thereon be in *Middlesex*, the jury who try it shall be of the place where the oath was tendered. And on the issue of not guilty the defendant may give in evidence that the person tendering the oath was not bishop at the time.

[Junk. Cent. 5. cap. 93. S. C.]

(15) **E**DMUND BONNER, late Bishop of *London*, was certified in *B. R.* by *Dr. Horne*, the Bishop of *Winton*, for refusing the new oath appointed to ecclesiastical persons by the statute of the first of the now Queen, c. 1. to him offered and administered in *Southwark* in the house of *Winton* there: and his addition was *Doctor of Laws*, and *ordained in boly orders*, and not *Clerk* nor *Bishop*, and therefore the certificate was challenged; *sed non allocatur*. And also the certificate was entered of record that it was brought into court on such a day and year by *A. B.* Chancellor of the said Bishop of *Winton*, and it does not say by the command of the Bishop, and exception was taken to it for this cause: *sed non allocatur*, because the recording of it by the Court is not of necessity &c. Also he was indicted upon this certificate

ificate in the county of *Middlesex*, s. by the common jury of inquiry in *B. R.* for the county of *Middlesex*, according to the statute of the 5th year of the present queen [c. 1. § 9.], and he pleaded not guilty to it : and it was holden that the trial shall not be by men of the county of *Middlesex*, but by men of the county of *Surrey* of the visne of *Southwark*, because no mention is made in the statute of the trial, but of the indictment only, which is warranted by the statute in that county in which the King's Bench sits. And it was much debated among all the Justices at LORD CATLYNE's chambers, Whether *Bonner* may give in evidence upon this issue, s. that he is not guilty thereof, that the said Bishop of *W.* was not a Bishop at the time of the offering of the oath ; and resolved by all, that if the truth of the matter be such in fact, he shall be well received to it upon this issue, and the jury shall try it.

Full Church Hist. 9. 60a. p. 80.

21. H. 6. 3. b.

Doctor named Clerk is a good addition.

[2. Hawk. P. C. 272.]

35. H. 6. 55. 12. E. 4.

16. Dier, 246. b.

36. H. 6. 26. 3. Cms.

397. Dier 31. a.

Dorset against Lane.

(16) FORMEDON in the *Discender*, the tenant pleaded in bar a fine with proclamations levied in *Easter* Term in the 30th year of *H. 8.* between him and the father of the demandant ; and pleaded the proclamations in certain, the four first proclamations in the same *Easter* Term in the 30th year, and other four in *Trinity* Term in the same 30th year, and other four in *Mich.* Term in the same year, and the four last proclamations in *Hilary* Term in the same year, as by that fine more fully appears ; and concluded in his plea, judgment *fi actio*, against the fine aforesaid with the proclamations aforesaid in form aforesaid levied &c. And the demandant said *nul tiel record* : and at the day * given to have the record, it appeared by the record that *the 30th year in Trin. Term* was omitted by the fault and negligence of the writer in the proclamations of this Term, but in all the other three Terms *the 30th year* was well written. And Whether this shall be said a failer of the record was the question : and by the opinion of the Court this was not a failer, but the plea is sufficiently warranted by the record ; for it cannot be intended that the fifth, sixth, seventh, and eighth proclamations could have been made in another year than in the 30th year, as the case above is ; for the year of *Easter* Term is expressly declared which precedes the four proclamations of *Trinity* Term,

On the issue of *nul tiel record* of a fine with proclamations in 30. H. 8. the year was omitted in the proclamations in *Trinity* Term, but in those of *Easter* and *Michaelmas* it was inserted; this was held no failer of record.

[3. Com. Dig. 394, 395. Cowp. 476. 1. Hen. Bk. 49. 162. 4. Term. Rep. 590.]

* [234. b.]

Dy. 153. b. 187, 188. 128. a. 20. E. 3. Annuity, 33.

Br. Failer de Record. 1.
4. 6. Dier, 113. 33.
H. 6. 47. 16. Aff. 6.
19. Record. 28.

g. Brown, 72.

Term, and the last eight proclamations in *Michaelmas* and *Hilary* Terms are expressly declared to be in the 30th year of *H. 8.* so that it follows of necessity, that it must be intended in the 30th year of *H. 8.* so in substance he hath not failed of the record. *Vide simile, M. 7. H. 4. 2. [pl. 6.]* and *East. & 33 H. 6. 17. nul tiel arbitrement :* and 16. *Lib. Aff. 6. [48. pl. 19.]* and *M. 15. & 16.* of the now Queen in a writ of covenant in *C. B.* between & *Berisford* and Others, and the *Bishop of Sarum*, late Almoner, upon an acknowledgment of satisfaction of *Oty*, Deputy Almoner, in *B. R.*, in an information for the Queen there exhibited of debt on bond to one *Jane Bently*, widow, who had lately been a *felo de se.*

Sir Nicholas Poinces' Case.

The wife buys silks for apparel, the husband pays for the making of them up into cloaths ; this is not sufficient assent to charge him for the goods. *Sed quare.*

Fitz. 121. G. 1. Ro. Ab. 151. 21. H. 7. 40. b. 11. 20. H. 6. 30. 22. 27. H. 8. 24. 11. H. 6. 30. b. 43. E. 3. 33. 34. Det. 263. Br. Contracts 19. Dr. & Stu. 137. a. Hutt. 106. 2. R. 3. Br. Contracts, 40. Dier 302. 1. Kobl. 70. 207. 1. Sid. 124.

[Skin. 349. Salk. 118. and the Books cited there ; and Bul. Ni. Pr. 135, 136. contra.]

(17) **D**EBT against *Sir Nicholas Poinces*, Knight, by the Executors of *Wheler*, mercer, *London*, and declaration upon the buying of certain velvets and silks, &c. The defendant pleads *non detinet per patriam :* and in evidence it appeared that the wife of *Sir N. P.* without his assent, command, or will, bought the said wares for her apparel of the said *Wheler*, who had notice that she was a *feme covert*, and had delivered it to her taylor to make the cloaths upon credit. And afterwards the taylor was paid by the husband for making them and other cloaths that he had made for the husband ; and then the taylor asked him for money for the mercer for the said wares, but the husband refused to pay it : and upon this evidence the defendant offered to demur, but the jury was charged, and at their return the plaintiff was nonsuited, and the jury affirmed that they would have given their verdict also against the plaintiff ; but I much doubted thereof at *nisi prius* in *Guildhall, London.* (a)

(a) From the cases in *Sid. Skin. Salk.* and *Law of N. P.* cited in the margin, it seems that in this case there was ample assent to charge the husband. For cases in which generally he would be liable to her contracts or otherwise, and where she is or is not liable as a *feme sole*, see 1. *Com. Dig. 567. 1. Bl. Rep. 903. 1079. 1195. 1236. 1. Term Rep. 5. 1. Br. Caf. in Ch. 16. & 17. in not. 2. Br. Caf. in Ch. 545. Cook's Bk. L. 28. Hen. Bl. 348. 4. Term Rep. 363. 766. In C. B. 1. Hen. Bl. 90.*

the Court held him liable to repay a person who discharged her funeral expences where he had gone abroad and left her and she died in his absence : and in *M. 31. G. 3. M3.* the Court of *B. R.* refused even a rule to shew cause why a new trial should not be granted (a verdict in such case being for the plaintiff), though *MR. LAW*, who moved for the new trial, urged that the husband lived apart from her at the time of her death, and she had a large separate maintenance.

Newdigate *against* Lord Hastings of Loughborough.

(18) **T**HE lessee for life and the lessor joined in a lease for a term of years by indenture : the lessee died, the termor committed waste, and the lessor brought an action of waste against him, supposing of his own proper demise, without shewing the special matter in the count; but the case was disclosed by the defendant by plea in bar of the action, with an *absque hoc* that the plaintiff demised &c. And by the opinion of BROWN and DYER * the writ and count are good enough, and the plea is not good; for although it was only a confirmation of the first lessor during the life of the first lessee, yet now by the death of the first lessee it is become in law a demise and lease made by him. But WESTON and WALSHÉ *à contra*.

If the lessor and lessee for life join in a lease for years, and after the death of the lessee for life the termor commit waste, whether the first lessor can declare as on his own demise? qu.

[Dal. 72.] } S. C.
Mo. 72.

Co. Lit. 45. 7. H. 6.
23. 27. H. 8. 13. a.
6. Co. 15. a. 13. H. 7.
15. a. 13. E. 4. 4. a.
3. Co. 28. 46. E. 3.
17. a. Dier, 153. b. 2.
Cro. 185. Co. Lit. 45.
a. resolved accordingly.
Plow. 140. b. 22. H. 6.
43. 14. E. 4. 1. b. 13.
H. 7. 14. b. Waste. 44.
Dy. 252. 324. 339.
[3. Bac. Ab. 398. L.
Term Rep. 86.]

* [235. a.]

(19) **O**NE who had murdered his master in the fourth year of the present Queen was indicted for it, as of wilful murder, without *traiterously* in the indictment. And upon the evidence it appeared to the Court that the offence was *petit treason*, which offence by the act of general pardon in the fifth year of the present Queen [c. 31.] is discharged and pardoned as to the Queen, but murder is excepted by the act. And upon this indictment of murder the party was arraigned and found guilty, and yet WALSHÉ, *Justice*, reprieved the prisoner without judgment at the last assizes, for which he was blamed by some, but without cause, as it seemed to the Judges. See *East*. 14. *EL*. fol. 308. a.

Murder is merged in *petit treason*, which being discharged by a general pardon excepting murder, a servant convicted of killing his master, but not laid *predominant* was reprieved.

See Saccombe's Appeal, M. 33. H. 8. in Banco Regis. 33. H. 8. 50. a. 6. Co. 13. b. Murder, 9. extinct in *petit treason*.

[2. H. H. P. C. 340.
Fost. Cr. Law. 324. 325.
1. Hawk. Pl. C. 133.
note (3).]

Affaby and others *against* Lady Anne Manners and others.

(20) **M**EMORANDUM, that before the statute of 27. H. 8. [c. 10.] A. was seised of land in fee, and in consideration of a marriage to be had between his daughter and heir apparent, and B. son and heir apparent of C. he covenanted and agreed by indenture with C. that he himself would have, hold, and retain the land to himself, and the profits

A. in consideration of his daughter's marriage covenants to stand seised to his own use for life, and that at his death she and her husband shall have the land in tail, and that all persons should stand seised to enjoy uses, and al-

so for further assurance. After the marriage he bargains and sells with fine and recovery to one with full notice of the covenants and use; this is of no avail, but on the death of *A.* the daughter and her husband may enter.

M. 10. H. 8. Rot. 757.

1. Mar. 96. a.

Dy. 35. 55.

3. Co. Twine's Case.

Br. Feoffments al Use,
20.

5. Mar. 155. a. 1. Co.

122. b. 5. Co. 60. Di-

er, 321. a.

profits of it during his life, and that after his decease the said son and daughter should have the land to them and to the heirs of their two bodies lawfully begotten, and that all persons then or afterwards seised of the land should stand and be seised immediately after the marriage solemnized to the use of the said *A.* for the term of his life, and after his death to the use of the said son and daughter in tail as above: and covenanted further to make an assurance of the land before a certain day accordingly &c. and then the marriage took effect; and afterwards *A.* bargained and sold the land for two hundred marks (of which not a penny is paid) to a stranger, who had notice of the first agreements, covenants, and use, and enfeoffed divers persons to this last use, against whom a common recovery was had to this last use: and also *A.* levied a fine to the recoverers before any execution had, and notwithstanding all these things *A.* continued possession in taking the profits during his life; and afterwards died; and the son and daughter entered, and made a feoffment to their first use. And all this matter was found in assize by *Affaby* and others against *Lady Anne Manners* and others in the eighth year of *H. 8.* by a special verdict.

Dier, 101, 102. 162. a.

32. H. 8. B. N. C. 184.

[Vin. Ab. Uses (O. 4.)

and (S. a.) 5. Bac. Ab.

365, 366. Shep. Touch.

489.]

* [235. b.]

Winch. 60. 1. Keb.

275.

Br. Feoffment al Uses,

16. 4. Mar. 162. a.

34. H. 8. 55. 1. Ma.

94. 96. a. Dier, 77. a.

See 2. Co. 52. a. Sir
H. Cholmley's case,
where the reason is that
no use was raised, for
that the covenantor was
tenant in tail [But see
3. Bur. 1705. and the
books there cited.]
Br. Attaint, 4.

(21) And judgment was given upon great deliberation in the exchequer chamber by *FINEUX* and *MOORE*, then Justices of assize in *Surrey*, that * the entry and feoffment were good and lawful, and the use changed by the first indenture and agreement. Yet 32. *H. 8.* error was brought in *B. R.* upon this judgment, and the error assigned in point of judgment, *s.* because no use was changed out of *A.* by the said first indenture and agreement; but nothing came of it, yet the case was well argued there again, and *BROMELEY* and *HALES* were of counsel with the plaintiff in error. And divers defects were moved to the form of the writ of error: one was, because it did not make mention of the removal of the record of the assize before the Justices of the Bench &c. for the entire process and record of the assize were removed, and enrolled in the common pleas; and no judgment was given there: so the writ of error ought to have been special, *s.* before that the judgment was given, and that the record of it was removed into banc &c. wherefore &c. but the judgment in the assize has never been reversed hitherto.

Arden's Case.

(22) **G**RANDFATHER, father, and son. Lands holden *in capite* are conveyed to the grandfather for life, remainder to the father in tail, remainder to the right heirs of the grandfather, and afterwards the father died, so that the remainder in tail descended to the son: and afterwards the grandfather and the son levied a fine with proclamations *sur cognizance de droit come ceo &c.* by which fine the consuee ~~granted~~ and rendered the land back to the grandfather for life, remainder to the son and *M.* his wife in tail, remainder to the right heirs of the grandfather. And afterwards the grandfather surrendered and released all his estate, right, and interest in the land to the son and *M.* his wife, and to the heirs of the son, and then died, the son of the age of thirty years: Whether he shall be compelled to sue livery, *quære*. But at length, *propter opinionem Curie*, he sued livery.

IN CUR' WARD.

Where the remainder man in fee of land *in capite* releases the estate to his son, who had an entail in the land, on his death the son of full age must sue out livery. Dyer, 172. 213. 252.

Br. Livery, 40.

1. Inst. 22. b.

Dy. 229. a. 308. pl. 74.

[See stat. 12. Car. 2. c. 24. §. 1.]

Stephens against Westbrooke and others.

(23) **A**TTAINT by *Stephens* against *Westbrooke* and others, and the petit jury who passed in the assize against the plaintiff, whereby he was barred in the assize upon *nul tort, nul disseisin*. And now this Term in the Bench the Grand Jury found the false oath, and that the defendants disseised the plaintiff &c. and assessed damages and costs since the assize brought. And judgment was given that the plaintiff should recover his seisin &c. but not by the view of the jurors, (note this,) and the penalty of the statute of 23. H. 8. [c. 3.] upon which this attainr was brought. See well the form of the entry and judgment, because it was well examined.

SURREY.

In attainr by the plaintiff in assize, damages were assessed for the time since the assize, and judgment to recover seisin, without a *per verum juratorum*.

Mo. 68. } S. C.
[Dal. 69.] }

Co. Lit. 294.

10. Co. 117.

1. Leon. 33.

8. E. 4. 8.

Dy. 250. a.

[Rast. Ent. 52. b.]

* (24) **M**EMORANDUM, that after mid-day of the last day of this Term, all the Judges were assembled by command of the Queen to devise how the nine penal

* [236. a.]

If a statute create a new offence, and give a penalty to be recovered in any of the king's courts

(24) Trin. 13. Jac. Rot. 41. B. R. at Westminster. † *John Karlesse* was adjudged in Ireland in debt to the King five hundred pounds, for the profits of the deanery in *Dublin* &c. there it was adjudged, that the King in any court well prosecutes against every one

of record, it is confined to these at Westminster; but if no court be mentioned it may be sued for any where.

Jenk. Cent. 5. c. 94. S. C.
Hutton, 99. 1. Cro. 79.
4. H. 7. c. 19. Rast.
Husbandry, 1. 12. Co.
49. Plow. 208. 1. Ro.
Abr. 51. 6. Co. 19. b. 20.
Cro. Car. 146. 11. Co.
38, 39. Co. Jur. Courts,
65. 1. Inst. 37. 3. Cro.
737. Mo. 600.

[2. H. H. P. C. 29. 2.
Hawk. P. C. 28. 1.
Bac. Ab. 559. 3. Term
Rep. 442. 364. 4. Term
Rep. 109]

penal statutes, s. tillage, servants and labourers, apparel in the time of *P. and M.*, armour and horses, artillery and unlawful games, relief of the poor and vagabonds, woods, highways and bridges, and forestallers and regrators, should be best put in execution. At which time it was moved for a question, If an offence be created by statute which was not one at common law, and a penalty appointed in money to be recovered in any of the courts of record of the Queen by action of debt, Whether this offence and penalty may be punished and determined by the commissioners of oyer and terminer in the country? And by the opinion of all except CATLYN, SAUNDERS, and WHYDDON, it cannot, but only in the four ordinary courts of record at *Westminster*; but if no court be appointed it is otherwise, for then the king shall have his prerogative in which court he pleases, *Tamen quare bene.*

for his debt, particularly for a forfeiture due to the King, and the King can be restrained by r. o. law, and therefore a plea that it ought to be sued for in the Exchequer of *Ireland* was rejected.

Mich. 38. and 39. *El. C. R. Wilkinson v. Netterhall* [Cro. Eliz. 530.] accords with the case in *Dyer*.

† *Flages v. Hodges*, entered *M.* 1652. *R.* 442. where an action for not serving an apprenticeship was brought in the court of *Newbury*, and the judgment was reversed.

4. Car. Cro. 112, *Farrington v. Keymer*.

Brakine's Case.

Mortgagor of socage land paying off the mortgage shall, by *monstrans de droit* without petition, recover the lands which the king had taken into ward with the heir of the mortgagee, his tenant *in capite*.

5. E. 4. 4. a. 4. Mar.
139. a. 22. El. 369. a.
1. 10. Co. 133. 64.
13. El. 298. b.
11. Co. 455.
3. H. 7. 3. a.

BOWER and BARNES.

(25) **MORTGAGOR** and mortgagee in fee of land holden in socage; the mortgagee died seised of this land, and of other land holden in chief of the Queen, his heir within age: and this mortgage was found by office. The Queen seized the wardship of all the lands; the day of payment came; and the mortgagor paid the sum according to the condition to the executors of the mortgagee, and entered during the nonage of the heir. *Quare* Whether he shall answer to the Queen for the profits of the land after this entry, until the heir hath sued his livery, or not?

But it was holden in a like case in the Court of Wards, between *Bower and Barnes*, *East.* 10. of Queen Elizabeth, that the mortgagor after the payment shall have the land out of the hands of the Queen by a *monstrans de droit* upon this matter of record, and a suggestion of payment, without being driven to his petition.

Hilary Term,

7. Queen Elizabeth.

(26) **A**N action upon the case was brought for slanderous words, *s.* for saying that the plaintiff was a *murderer and a thief*. The defendant justified the word of *murderer*, by reason of an indictment against the plaintiff for a murder committed in the county of *Chester* at the great sessions before *SULYARD, Justice*, in the time of *H. 8.* And as to the other word, *s. thief*, he pleaded that there was a robbery committed &c. and the common voice and fame of the country was, that the plaintiff was guilty of it; and so justified. And as it seems by the opinions, neither the one nor * the other was a good justification. But if it was in false imprisonment, for arresting the plaintiff and carrying him to prison, to answer to the law, with suspicion of the defendant, with the common report and fame, for such cause it should be allowed. But the plaintiff passing over these pleas replied, that as to the first he acknowledged the indictment, and said that he was acquitted of it in the said county of *Chester* before *SIR NICHOLAS HARE, Justice*, by trial of his country, and shewed an exemplification of it under the great seal of the county palatine, *s.* the seal of the chancery there; to which the defendant rejoined, *nul tiel record*. And to the other plea the plaintiff replied, *de son tort demesne absque tali causâ*. *Quære* Whether *nul tiel record* be averrable against the exemplification, or not.

An indictment for murder against *A.* is no justification for calling him a *murderer*. Nor that a robbery was committed, and common fame charged *A.* with it, a justification for calling him *thief*. *Scus* in trespasses for apprehending and taking him to prison. Whether *nul tiel record* can be averred against an exemplification of one in the court of great sessions at *Chester* under the seal of the county palatine? *qu.*

* [236. b.]

[Hob. 82. Dougl. 357. 671. Cald. 291.]

Ow. 33. Bridg. 62. 4. Co. 18.

26. 27. H. 8. 9. 22. a. and 11. Dyer, 75. b.

7. H. 4. 35. 4. H. 7. 2. 9. E. 4. 27. 14. H. 8.

16. 5. H. 7. 5. a. 7. 8. 11. E. 4. 20. 3. 4.

10. H. 7. 17. a. 2. H. 7. 15. b.

Br. Faux Imprisonment, 14. Br. Record, 39.

[Hard. 118—120. 7. Sid. 143.]

7. H. 7. 14. 22. H. 8. B. N. C. 20. 39. H. 6.

4. a. Dier, 187. a. 16. H. 7. 11. b.

(26) *East. 30. Eliz. C. B. &* Action on the case by *Cotes* against *A.* for these words, *s.* "John Cotes was one of them that robbed Robbins," and they were at issue, and found for the plaintiff, and it was moved in arrest of judgment that the words as appear in the declaration were spoken in the time of Queen *Mary*. But by the opinion of the Court the plaintiff had judgment although the robbers were pardoned after the time of speaking them. *Quære*, whether a man may legally call another a *thief* who is pardoned, and the act of parliament, in *Markbam's* case, at *Ass. Nor. &* 16. *Eliz.*
Pana potest demi-culpa perennis erit. [Sec 1. Vin. Ab. 540: pl. 6. and the marg. note. 1. Keb. 115. 4. Black. Com. 422.]

(27) **M**EMORANDUM, that it appears *M. 34. H. 6. Rot. 446.* in debt by the administrator of one *A. B.* supposing by the writ that the said *A. B.* died intestate,

Executors renounce, the administrators appointed bring debt, and in the count suppose an intestacy &c. may be traversed, *qu.*

36. H. 6. 8. b. 10. H. 7.
9. Dyer, 202. 4 Co.
18. 49. E. 3. 17. Dy.
84.

[If an executor sue or is
sued as administrator,
the plea must traverse
intestacy. 5. Mod. 145.
1. Salk. 297, 298. 1.
Mod. 214.]

&c. he made a *profert* of the letters of administration in his declaration entered *verbatim*, by which it appeared that the said *A. B.* made a will, and three executors, and that they all refused before the ordinary, so he became in the situation of an intestate; wherefore the ordinary committed the administration to the plaintiff &c. And the defendant pleaded in bar, that the said *A. B.* made his will and his executors without this, that the said *A. B.* died intestate as by the writ is supposed, *et alii à contra*, and so to the country. Note well, because by the rule of the *Register*, fol. 141. the said clause, *s. who died intestate*, in a case of this sort as above, may be omitted &c.

The Queen against Sir John Thyn, Knight, and others.

DORSÉT.

The crown in *quare impedit* shall recover damages.

6. Co. 51. a. 22. H. 8.
17. 12. E. 3. Fit.
Champany, 9. 18. E. 3.
2. 35. E. 3. 61. Br.
Damages, 15. 161. 14.
E. 3. *Quare Impedit*,
54. that he shall not re-
cover.

[Bul. Ni. Pr. 123.
Wood's Inst. 153.]

(28) THE Queen brought a *quare impedit* against Sir John Thyn, Knight, and others, for the church of *Corfe Castle*, and the issue was found for her, and damages taxed for the value of the moiety of the church at ten pounds. And whether the Queen shall have judgment to recover damages was doubted. And by the opinions, she shall recover by the statute of *Westminster* 2. c. 5. which is only a penalty inflicted upon the disturber &c. which see in the time of *Ed. 1. tit. Quare Impedit Fitzherbert, cap. 181.* yet the contrary is holden, *tit. Damages, [cap. 17.] in Fitzherbert, East. 3. H. 6.* which is not found in the printed book of 3. H. 6. and in *T. 34. H. 6. fol. 51. obiter* in debt.

(28) Note. Damages adjudged to the queen in *quare impedit* for the rectory of *Rottingham* in *Essex*, 32. *El.* [Cro. Eliz. 162. 1. Leon. 149.] And upon this a writ of error brought in *B. R.* and there, for this finding of damages, the whole judgment given for the queen was reversed, although there were divers precedents shewn *pro.* and *con.*

* Easter Term, 7. Queen Elizabeth.

(29) **A** MAN beneficed in the diocese of *Peterborough* to the value of eight pounds a-year and upwards, (and yet valued in the records of the exchequer for the first fruits and tenths at six pounds a-year only,) accepts a benefice with cure in the diocese of *Gloucester*, and is inducted into it, whereby the first is void, and so remains void for six months, wherefore the ordinary of the first diocese collates, without giving any notice of the avoidance to the patron: it was demanded Whether he may do this or not, in *quare impedit*. And by the opinion of many, he may, without giving notice, because by the act of pluralities, 21. H. 8. c. 13. the first benefice shall be adjudged in law to be void, of which law every man at his peril is bound to take notice. And *Easter*, 16. of this Queen, the same opinion was confirmed by DYER, MANWOOD, and MOUNSON, but HARPER, *à contrà*. And CATLYN, *Chief Justice*, and WRAY, *Justice*, agreed to the former opinion, although the second benefice was in the same diocese as the first was. *Quære thereof*: But of avoidance by refusal to pay the tenth the act shews plainly that it is as void to all intents *ipso facto*, as if by the death of the incumbent. 26. H. 8. c. 3.

When a parson, having one benefice of eight pounds *yearly value*, (though charged at six pounds only for first fruits and tenths,) is inducted into a second benefice, it vacates the former. And of such avoidance the ordinary is not bound to give the patron notice before a lapse can incur. Nor, if void for refusal to pay the tenths.

[3. Burn's Eccl. Law, 39. Bul. Ni. Pr. 124. Wood's Inst. 39. Watf. Cler. L. 6. Gibf. Cod. 906. contra. 2. Wilf. 195. 3 Burr. 1508.]

3. Cro. 853. 4. Co. 75. b. 79. Dy. 127. b. 24. E. 3. 13. Noy, 38. Jo. 338. 5. E. 4. 3. b. 14. H. 7. 28. b. 9. El. 255. a. 22. El. 369. b. 11. H. 4. 37. b. 14. H. 8. 17. a. Dy. 69. 14. 15. H. 7. 21. 7. Dr. and St. 116. 1. El. c. 4. Ibid. 10. [Watf. Cler. L. 49. But now by 3. Geo. 1. c. 10. §. 2. persons making default of payment shall forfeit double value of the tenths.]

Makewilliams' Case.

(30) **B**EFORE the statute of 27. H. 8. [c. 10.] *Henry Makewilliams* having divers feoffees seised to his use of the manor of *S.* holden of the king by knight-service as of the honor of *Clare*, took an estate in possession of his feoffees, to him and his wife, and to the heirs of the husband on the body of his wife begotten, remainder to the heirs general of the body of the husband, remainder of the fee-simple to his right heirs. And of another manor holden *in socage in capite* of the king he enfeoffed divers persons to the use of himself for the term of his life, remainder of the use to his youngest son in tail, remainder to the right heirs of the father. And after the statute of 27. he died, his eldest son

IN CUR' WARD'.

Where land is holden in chivalry of the king to *A* and *B.* and the heirs of *A.* though *A.* die, his heir within age, if *B.* do not till his full age, he needs not sue an *aupre le maine*, for his body only was in ward.

Tenant in socage of *capite* lands enfeoffs to the use of himself for life, remainder to his youngest son in tail, remainder to himself in fee, if at his death the youngest son be alive, and have issue, the heir needs not sue livery for this land.

8. Co. Bingham's case.
Dy. 153. pl. 33.
9. Co. 126. a. 2. Cro.
40. 2^o El. 172. b.

* [237. b.]

33. E. 3. Gard. 8. 28.
E. 3. 93. 27. E. 3. 80.
Gard. 23. 28. H. 6. 9.
a. 32. H. 8. Br. Gard.
100. B. N. C. 187.
Dyer, 304. b.

[Stat. 12. Car. 2. c. 24.]

within age; and his mother lived until he came to full age; and after that she died. First, it was holden that he shall be in ward for his body during the life of his mother, by statute 32. H. 8. [c. 1.] where two are enfeoffed to them, and to the heirs of one. But it was * holden that he shall not sue *ouster le maine* because the land was never in the hands of the king by the nonage of the heir, but only a naked remainder. Also it was holden that for the socage he shall not be bound to sue livery, if the youngest son be in life, and have issue, as the case was in fact. *See the case next following.*

Bromeley, Recorder of London, against Bennet.

1566.

A. levies a fine to himself and wife for life, remainder to his own right heirs with grant and render to him alone for life, remainder to *B.* for life, remainder to *A.*'s right heirs. The render by the wife shall not defeat her life interest, and the remainder to his own right heirs is void, the ancient reversion being in him.

Dy. 69. b. 2. Rol. Abr. 414. 1. Leon. 102. Roll. Contin. 473. 4. H. 6. 20. Dy. 172. b. 1. H. 5. 8. Dy. 34. 156. b. 399. 134. 29. H. 8. 9. a. Br. Tenures 21. 43. E. 3. 12. b. 14. H. 4. 32. B. N. C. 186. 4. Mar. 156. b. 41. E. 3. 24. b. 16. El. 326. a.

(31) **A** FINE is levied to husband and wife and to the heirs of the husband, the husband being sole seised before; and they granted and rendered back by the same fine the tenements to the conusor for the term of the life of the husband, remainder to a stranger for the term of his life, remainder over to the right heirs of the husband: the husband died, he in remainder for life died, living the wife: Whether the wife, or the right heir of the husband shall have the land, was the question in the Court of Wards, and also in *B. R.* in an *ejectione firmæ* between *Bromeley* and *Bennet*. And by the opinion of the Court of Wards, the wife during her life shall have the tenements, for her interest is not gone by joining in the grant and render with her husband, unless the remainder be good as a remainder to the right heirs of the husband: but here it seems the remainder is in the husband and his heirs as a reversion, and not a remainder, because the husband seised of an estate in fee could not limit the fee simple to his own right heirs by way of remainder, where it was never out of his person, wherefore &c. Yet the case was argued in *B. R. M.* 10. & 11. of the present Queen, at bar and bench. (32) And by the opinion of three Judges there, *s. CARUS*, *SOUTHCOT*, and *WHIDDON*, this remainder shall be in the right heir of the husband as a purchase, and not as a reversion by descent: but *CATLYNE Chief Justice* *è contra*. And judgment was given in the same term by the aforesaid three Justices, against the will and opinion of the said *Chief Justice*, and against the opinion of *DYER*, and *SAUNDERS* *Chief*

6. E. 6. 69.

[4. Bac. Ab. 298. 2. Mod. 211. 1. Bl. Rep. 22. Mr. Butler's note to Co. Lit. 299. b.]

Chief Baron. And afterwards it was put in the arbitration of the said JAMES DYER, and GERRARD, *Attorney[General]*, who settled the dispute. And BROMELEY redeemed the title for money. See *Eaff.* 15. E. 3. a fine levied to the husband *come ceo que il & sa feme ont &c.* and they granted and rendered to the conuser the land to hold for the term of the lives of the husband and wife, and after their decease the remainder to the heirs of the husband; and the fine was not received, for a man cannot entail a remainder to his heirs during his own life, if it do not begin first in himself, and this by reason of the reversion saved, *Nota.*

19. E. 3. Fines; 47.

Rast. Distress, 11.

[* 238. a.]

KENT.

(33) **I**N an action upon the statute 1. & 2. P. & M. c. 12. for the division of an entire distress taken at one time, in divers several pounds, whereby the owner is driven to several replevins; which is the second branch of the statute. It was moved upon evidence to the jury in the Bench, Whether the place where the distress was taken was material, or not: And DYER and WALSH thought not, any more than in trespass for goods carried away &c. But BROWNE and WESTON *contra*; therefore *quære* well; but CATLYNE and SAUNDERS afterwards agreed to the first opinion. But clearly if the action had been brought upon the first branch of the statute, then the place is material, for, by all, the distance of the places makes the offence.

In an action on the 2d. branch of the first section of 1. & 2. P. & M. c. 12. the place where the distress was taken is not material, though it is on the 1st branch where the distance is the offence.

Dy. 177.

Litt. 435.

[Off. Brev. 387, 388.]

Lord Shandois against Wye and Others.

(34) **T**RESPASS brought upon the statute *West.* 2. c. 28. [1. c. 20.] *de malefactoribus in parcis et vicariis* (a) by the Lord Shandois against Wye and others for the taking of one sorel and ten rascals: and by *nisi prius* the defendants were found guilty: and now the plaintiff prayed judgment, and it appeared to the Court; that what concerns the Queen, i. the ransom; the finding surety that they should not trespass any more; and the abjuring the realm for non-ability of payment of it; is pardoned by the general pardon

GLOUCESTER.

The action on *West.* 1. c. 20 must be to answer as well the king as the plaintiff. And in the writ there must be a double recital of finding surety.

Whether the bond not to trespass any more does not extend to all parks; and Whether it must be made to the King or the plaintiff? *Quære.*

Mo. 58.

[Dal. 60.] } S. C.

(a) How the law has been altered with respect to these offences in parks and ponds, see Hawk. P. C. B. 1. c. 49. and Appendix 3. to cap. 38.

[16. Vin. Ab. 186, 187.]
 [2. Hawk. P. C. 555.]
 Post. 323. a.
 1. H. 5. 1. 30. E. 3. 11.
 47. E. 3. 10.
 Lib. Intr. 58. b.

1. Inst. 200.

[F. N. B. 154. 1. Com.
 Dg. 227, 232.]

Br. Action Popular 5.
 Dy. 159.

2. Inst. 201.

in the 5th year. And then judgment is to be given for the damages, and imprisonment of three years. And *quare* whether there shall be finding of surety that he will not trespass any more &c. and for the other *sit inde quietus*. And *quare* whether this bond that he will not trespass any more does not extend to all parks within the realm. And *quare* also, whether the bond shall be made to the Queen or to the party plaintiff. (35) But note that all the precedents of this action are to answer as well to our lord the King as to the party plaintiff: and also double recital of the finding of surety according to the words of the statute whereof I have seen several precedents. And because these defaults were perceived in this action brought by *Lord Shandois* in his own name, and the surety only once recited in the writ, *ideo Curia advisare vult*, until next *Michaelmas Term*. And see a good precedent *Hil. 24. H. 7. Rot. 26.* in *B. R.* that the defendant a prisoner in the *Marshalsea* upon the judgment in this action after the three years was compelled to find sureties of *London* and *Southwark* whereof two were gentlemen and yeomen, by recognizance, each surety in ten pounds, and the defendant himself in forty pounds to the king that he should no more commit trespass in any parks and ponds against the form of the statute &c. And the plaintiff acknowledged himself satisfied of the damages, and the defendant went quit. And note, that no precedent in *C. B.* can be found in this case; but see *Trin. 13. H. 8. Rot. 480.* and *5. H. 5. 1.*

* [238. b.]

If the coroner find a *fugam fecit* in his inquisition of murder, the party shall forfeit his goods, though he be acquitted both of the murder and the flight before the jury at his trial.

Stamf. Prer. 181. b. 183.
 c. d. 27. H. 8. B. N. C. 297.
 21. H. 7. Kelw. 68. Poulton, 226. 14. H. 7. 2. b.
 Plow. 12. 11. H. 4. 93. a.
 22. Aff. 39. 37. Aff. 13.
 5. Co. 109. b. 3. E. 3. Itin' North. Forfeit, 27. 5.
 Co. 109. Jen. Cent 4. c. 9.
 [1. H. H. P. C. 363. 417.
 2. H. H. P. C. 63—65.
 300—302. 2. Hawk.
 P. C. ch. 9. §. 33. 54.
 2. M. Rep 981.]

*(36) A MAN is indicted for murder before the coroner *super visum corporis*, and that he fled &c. And afterwards he is arraigned upon this indictment, and pleads not guilty, and is acquitted thereof, and that he did not fly nor ever withdrew himself upon that occasion; and it was found that one *I. S.* was guilty, *ut oportet*. The goods notwithstanding this are forfeited by the first indictment, which is of more force in this point, than is the acquittal; for in this point it is only an inquest of office, and no charge in this case to inquire whether he fled after the murder, was to be given to the jury, Wherefore &c. And this by the opinion of divers Judges this Term. *Accord' Mich. 13. E. 4. [3. b. pl. 7.] case 5. in my Abridgement (a).*

(a) These words in Italics are in the Edit. of 1592. but omitted in all subsequent.

Sir

Sir Rich. Leigh Knt. for the Queen *against* Hudson.

(37) **I**N account for the arrearages of a rent upon the charge of an auditor of the Queen in the Exchequer, it was pleaded that a long time before the Queen had any thing in the land out of which &c. one *I.* abbot of *D.* was seised in fee as in right of his house, and leased it with the assent of his convent by indenture sealed with their common seal for a term of years yet to come, to one *A. B.* by virtue of which he was possessed, *que estate* the defendant has &c. And for the Queen, the ATTORNEY maintained the intrusion, and traversed the lease by the abbot, *et alii à contra*. And it was found for the defendant, and 'against the Queen: and in arrest of judgment this default in the plea (because the intruder by the course of the exchequer ought to make a title (*a*), otherwise he shall be dispossessed,) was alleged for the Queen, *s.* that the pleading of a *que estate* of a term, which may well be granted out of the land, differs from a *que estate* of a freehold. And therefore the plea was not sufficient if the ATTORNEY had demurred to it, but now the advantage of this is passed. And the grant of the estate of the termor to the defendant not denied, but the lease of the abbot only traversable, which was the original and ground of the estate &c. Wherefore in the next *Michaelmas Term*, judgment was given against the Queen.

Defendant having pleaded a *que estate* of a term, the Attorney General for the King in the Exchequer traverses the original lease; after verdict against the king upon this issue, it is too late to take advantage of the bad plea.

Dy. 74. Co. Lit. 300. b. Roll. Contin. 494. 7. E. 6. Que Estate 31. 2. Kebl. 96. B. N. C. 440. 5. H. 7. 39. Dy. 117 pl. 9. 1. Inst. 121. a. Co. Jur. Courts 116. 18. E. 4. 10. b. 2. El. 172. a. 6. Co. 25. 2.

[See 5. Com. Dig. 80, 81.]

It is made good by traverse in the case of the King, 1. E. 5. 3.

(37) *Trin. 36. Eliz. Rot. 134. C. B.* in *ejectione firmæ* by *Goffams* against *Thurston*, [Owen 16.] where the defendant pleaded a *que estate* of the lessee of the abbot without shewing how he came to his estate, and *PER CURIAM*, that is a good exception, for he shall be compelled to shew how he came to his estate of a Term, inasmuch as this cannot be but by legal means. *Contra* of a freehold.

(a) But now by 21. Jac. 1. c. 14. In informations of intrusion where the King &c. hath been out of possession 20 years before information brought, the subject is allowed to plead the general issue and retain posses-

sion till trial: and no *scire facias* shall be brought where an information of intrusion may, that the subject may not be deprived of the benefit of the act.

(38) **T**HE deputy of a customer in a creek of a port (in which case a deputy is to be made by the statute of the 1st year of Queen *Eliz.* c. 12. [c. 11. §. 8.] falsely concealed the custom of a merchant; and the customer himself, (ignorant of this) certified by his oath the customs of this port into the exchequer, according to the false information of

Though the customer of a port must by 1. El. c. 11. make a deputy, still if he certify falsely into the Exchequer thro' the concealment of that deputy, he is liable to the penalties of 3. H. 6. c. 3.

R.221. 3.Cro.534. Mo.
777. 22.H.6.29.b. 39.
H. 6. 34. Dier 161. b.
Dr.& St. 135.138. 2.Ro.
Rep. 26. Styles, 357.
[2. Inst. 466. 3. Mod.
146. 323. Cowp. 403.
Douglass. 2. Term Rep.
154.]

his deputy: Whether the customer himself shall be impeached of this false-concealment by the Queen, for the forfeiture of the treble value of the merchandize so customed, and shall be fined and ranomed according to the statute of 3. H. 6. c. 3.* or not, was much in argument in the Exchequer this Term. And at last, judgment was given for our lady the Queen against the customer: by the report of SIR ED. SAUNDERS, *Chief Baron*.

Trinity Term,

7. Queen Elizabeth.

Three impleaded as heirs in gavelkind (one of them an infant,) were all outlawed, the two of full age purchased their charters of pardon; in *five facias* against them *simul cum &c.* the parol shall not demur for the infancy of the other, who is out of court till reversal.

Outlawry of an infant is not void, but voidable by error.

East. 7. El. Rot. 1137.

[Raft. Ent. 208.]

b. Bendl. 146.] } S. C.

1. And. 10.

Mo. 74.

[Rob. on Gavelk. 91. 116.]

1. Inst. 376. b. Gold. 109.

Dy. 244. b. 344. a. 10. H.

7. 8. b. 12. 2. Keb. 259.

553. 11. H. 7. 12. b. 3.

Co. 13. a. Dy. 368. 210.

Flow. 441. 48. E. 3. 4.

Br. jointenants 27. 5.

Co. 19. 43. E. 3. 19. a.

11. H. 6. 10. b. 9. H. 6.

47. a. 29. Aff. 37. 15. E. 3.

Counterple de Vouch.

518. a. 30. E. 3. Age,

131. 8. E. 2. Age, 125.

19. E. 3. Age, 122. 18.

E. 3. 33. 11. H. 6. 49. 1.

E. 5. 3. F. Age, 17. 3. E. 3.

Itin. North. Age, F. Tit.

50. 3. Age, 5. Stat. Ut-

lagary, 11. 13. 38. E. 3.

5. Utlagary, 14. 2. Mar.

104. 2. 28. E. 3. Stat.

Utlagary, 7. 2. Ro. Abr.

805.

[3. Bac. Ab. 162.]

Hawtrie against Auger and Others.

(39) *SIR Anthony Auger*, knight, being seised in fee of divers lands in gavelkind, bound himself and his heirs in a bond of two hundred pounds to *Hawtrie*, and had issue three sons, and died seised; and they entered, and the eldest of them had issue a daughter and died, but the daughter was born after his decease. And debt in the *debet* and *detinet* was brought against the three as heirs &c. and process continued until the uncles were outlawed, and the niece waived: and the uncles sued a charter of pardon, and brought a *scire facias* to have it allowed against the plaintiff who appeared and counted against them all this matter, and in the *simul cum* against the niece. And the uncles pleaded, that their niece who was waived was only of the age of seven years, wherefore they insist; that during her minority they ought not to answer &c. And upon this it was demurred in law &c. And by the opinion of the Court, the parol ought not to demur, because the niece is out of court, and the original determines against her. And if at full age of her, the plaintiff will have a re-summons, it ought to be sued against the uncles only who appeared, and not against the niece, because she was out of court, and never appeared to the Court, Wherefore &c. And for this, judgment was given that the uncles should answer over; and holden that the outlawry was not void against the niece, but voidable by error.

Hodge-

Hodgeskins *against* Tucker.

(40) ONE *Rawlings* late provost in the cathedral church of *Wells*, being parson imparsoned of the parsonage of *Winsame* in the county of *Somerset*, made a lease of the tythe barn, and certain land with the tythes of the said parsonage by his deed for fifty years to *Tucker* rendering a rent of ten pounds to him and his successors and assigns: and this lease was confirmed by the dean and chapter, but not by the bishop, who was patron and ordinary. And afterwards the deanery of *Wells* was dissolved as well by the grant and surrender of it, and all the possessions annexed or appertaining to it, made to the king, as by act of parliament in the 1st year * of King *Edw.* 6. and by the same act a new deanery was created there, whereof the King and his heirs and successors are patrons, and by the same act the provostship aforesaid, with all the possessions and liberties thereof, was united and annexed to the said deanery whenever it should next happen to be vacant, and a saving in the act of all strange titles and interests, other than the provosts and their successors and the bishop and his successors &c. And afterwards one *Goodman* was made the first dean of this new erection, and afterwards *Rawlings* the provost died, and *Goodman*, without making any entry into the parsonage of *Winsame*, accepted the rent of *Tucker*, and notwithstanding this he afterwards made a lease of the said tythe barn, land, and tythes aforesaid for sixty years to the said *Hodgeskins* which lease was confirmed by the bishop, and by the dean and chapter also, and he entered by virtue thereof, and *Tucker* re-ousted him, upon which *H.* brought *ejectione firmæ*, and the issue was, not guilty: and all this case was found by special verdict by *nisi prius*, and they prayed the aid and discretion of the court &c. (41) And now the case was argued at the bar, first, Whether the lease made by the provost was void by his death for default of the confirmation of the bishop, or only voidable. Also admit that it be only voidable, then Whether the acceptance of the rent by the new dean before an actual entry by him made be good to confirm the lease, and Whether he is privy in law to do it, being a stranger to the lessor, and not his successor, because the succession of the provostship is gone and determined. Also, Whether the jury may find this act of parliament, being

Mich. 2. & 3. *Eliz.* Rot.
536.

Lease for years of tithes by the provost of *W.* confirmed by the dean and chapter, but not by the patron and ordinary, the provostship by parliament is united on the death of the provost to the deanery;—Acceptance of rent by the dean is no confirmation of the lease which is void by the provost's death.

Whether the jury may find a special act of parliament not delivered to them in evidence exemplified or otherwise.

* [239. b.]

Bendl. 80. pl. 126. S. C. Dy. 273.

7. Co. 8. a. Bridg. 94.

Temps R. 2. Grant. 102.

38. H. 8. 61. a. Qy. 52.

282. 3. Leon. 752.

Plov. 458. a.

Mich. Ult Rot. 2394.

59. E. 3. 27. a. Dy. 244.

a. 252. 259. a.

B.N.C. 381. 31.H.8.46.
[See Plow. 410. note (c)
Bul. Ni. Pr. 222. & 2.
Term Rep. 570—574]

[3. Bac. Ab. 392. &c. 376.
Watf. Cl. L. 478.]

Lit. 143. b. 8. H. 6. 25. a.
12. H. 8. 7. b. 2. H. 4. 5. a.
Fitz. 194. 1.
21. H. 7. 38. Dy. 46. 3.
Co. 65. 11. H. 6. 9. a. 8.
E. 3. 45. 14. H. 8. 14.
22. E. 4. 27. 7. Co. 8. 24.
H. 8. 54. 8. H. 5. 11. b.
31. H. 8. 46. b. 3. Co. 65.
2. Abb. 9. Fitz. 50. c.
Br. Acceptance 15. 32.
H. 8. B.N.C. 172. 380,
381.

* [240. a.]

9. H. 6. 44. Dy. 337. 20.
H. 6. 8. a. 21. H. 7. 38. b.
11. H. 4. 17. 22. H. 8.
Br. Acceptance 14. 19.
14. H. 6. 20. a. 22. H. 8.
16. B.N.C. 59. 54. 172.
321. 370. Dier, 1.
[Co. Lit. 215. a. Cowp.
483. Dougl. 53. 1. Term
Rep. 95.]
[11. Co. 79.]

7. Co. 8. 9. E. 3. 41.
6. H. 8. Cro. 168.

private not shewn to them exemplified under the great seal, nor shewn in evidence by any of the parties, by the purport of the record of the verdict; but the tenor of the act is found *verbatim* &c. And by the opinion of WALSHE, WESTON, and DYER, who argued on the bench, the lease of the provost was † void, and determined by his death, as if it had been a demise of the rector of a church, or a prebendary who have patrons of their promotions, and are presentative or collative and not elective, as a bishop, dean, master, or abbot, or prior are. And also none of the said three, namely parson, provost, or prebendary, is able in law to make a discontinuance, and their successors shall have the *juris utrum*, and not *sine assensu capituli*, and particularly where the body of the provostship or prebend is a parsonage, and not a laity or layfee. And many books prove that they shall have aid of the bishop, as patron and ordinary, in any action where they shall be charged. (42) And there is a difference between leases made by them for the life of another, and a lease for a term of years, for the first are not void by the death, without entry made; and this is proved by the case of *Juris Utrum* in 11. E. 3. [Fitz. Abr. Tit. *Juris Utrum*, 3.] of the acceptation of fealty of the lessee for life of his predecessor. * And 2. H. 4. [2. a. pl. 7.] Waste by the successor of the archdeacon of Wells against such a lessee &c. Also the acceptance of the rent above by the dean where there is no reversion was void: or if the reversion to which the rent was reserved be gone or determined as by the death of tenant in tail or dower, or be changed, the acceptance of rent by them in reversion or remainder is void. And WESTON argued that for default of privity the acceptance above was void; but DYER thought contrary to this, for although he be not privy or named his successor in the provostship, yet in truth and in fact he is, & in the parsonage and tythe barn &c. he is successor, and shall be named parson where any parcel of the parsonage or charge in it shall be demanded, as an abbot parson impropriate &c. But *quare* of this, because the words of the act are, *that the*

† *The reason.* Because the bishop of the said diocese who was the ordinary there, did not confirm the said first lease to *Tucker*, this lease was void by the death of the said *Rawlings*, notwithstanding the acceptance of the said rent by the said *Goodman* the new dean; for the said *Goodman* was as a grantee by the act of parliament and not a successor. Bendl. fo. 80. ca. 126.

Disseisor made a lease for life reserving rent, and afterwards granted the reversion to the disseisee, who accepted the rent of the lessee, this acceptance concludes him. 28. H. 8. 30. [b. pl. 207. ante.] 3. Co. 15. *accord.*

dean

dean shall have it as Dean, and by that name shall be impleaded and pleadable &c. And at length with the assent of BROWNE, judgment was given for the plaintiff.

F. N. B. 49. c.
Judicium, post. 252. b.

Broughton against Conway.

(43) **A** TERMOR of lands and tenements (whereof the wife of his lessor has good title of dower, and who also recovers, and has execution of the third part in severalty, by assignment of the sheriff,) by indenture, with recital of his lease, gave, granted, assigned, demised, and to farm let, all the said lands and tenements comprized in the indenture of the former lease to another, "to have, hold, peaceably enjoy" and possess all the said lands and tenements to him and his "assigns during the term of years then to come. And further, "he covenanted and granted that he had not made any former "grant, or any thing, whereby this grant or assignment might "be in any manner impaired, hindered, or frustrated, BUT "THAT the said assignee and his executors by virtue of that "grant and assignment might quietly have, hold and enjoy "all and singular the premises with their appurtenances during the term to come, without any impediment or disturbance by him or by any other person, &c." and executed a bond to the assignee with condition to perform and accomplish, or cause to be performed and accomplished, all and singular the covenants, grants, agreements, and articles in the said last indenture contained, and on his part to be performed and accomplished. (44) In debt on the bond, he pleaded the condition and the indenture *verbatim*, &c. and in performance of it, pleaded that *before the indenture he had not made any grant, or any other thing whereby the grant or assignment aforesaid could be in any manner impaired, or &c.* BUT THAT he had had, held, and quietly enjoyed all and * singular the premises &c. without impediment &c. according to the words of the covenant. And the plaintiff by replication shewed the matter of the recovery and execution of dower as above before the assignment or grant made to him by the

After dower recovered against a termor, he leases over and covenants "that he has done "no act to impeach, *but* "that the assignee may "quietly enjoy without "let of him or of any "other person;" the words *but that* have relation to the covenant that he had done no act, and extends it only to acts done by the defendant himself.

[Dal. 58.] } S. C.
Mo. 58.
2. Kebl. 291.
Dy. 42. pl. 14.
1. Rel. Ab. 426.
Winch. 91.
Latch. 105.
3. Car. Cro. 107.
27. H. 8. 29. a.

* [240. b.]

(43) *Hil. 40. El. B. R. & Peles and Jervies Case.* Tenant *pur auter vie* leases for twenty-one years, and covenants that he has not done any act *but* the lessee shall or may enjoy it during the years. Afterwards within the twenty-one years *cestui que vie* dies, adjudged, that the action of covenant does not lie, for *but* refers the words subsequent to the words preceding.

Dy. 300. 303. 328.

R. 29.

1. Cro. 107.

2. Rebl. 201.

2. Ro. Rep. 135.

2. Rol. Abr. 396.

Litt. Rep. 81.

1. Saund. 58, 59.

[2. Com. Dig. 566.

DougL43. 1. Term Rep.

671. 1. Hen. Bl. 34. Shep.

Touch. 168. and see

ibid. 162, 163. 3. Term.

Rep. 584. 4. Term Rep.

617.]

said indenture, by force whereof he had not nor did enjoy the tenements aforesaid without disturbance or impediment of the said wife according to the form and effect of the indenture, and this he assigns for the breach &c. And the defendant, by way of rejoinder, confesses all the matter of the replication as above, but says, that after the recovery and execution of the dower aforesaid, s. on the said day of the date of the indenture last aforesaid, he granted the whole estate and term of years which he then had to come of and in the tenements aforesaid with the appurtenances to the said plaintiff to have and peaceably enjoy according to the form and effect of the indenture aforesaid &c. And to this the plaintiff demurred in law; and afterwards the plaintiff died, wherefore &c. And the opinion of three of the Chief &c. were against the plaintiff, s. that the sequel of the sentence, s. "BUT THAT" is dilatory and depends upon the precedent matter, and no new matter or sentence. But BROWNE *è contra* strongly. See the like *M.* 8. of the now Queen, fol. [255, a. pl. 4.] and *M.* 3. & 4. of the now Queen, fol. [207. a. pl. 13.] for the intendment of (but) &c. The like *M.* 8. & 9. fol. [255. a.] for the words "and that without trouble, &c."

Trin. 5. Jac. B. R. & Gregory v. Gregory. In debt for rent upon a lease for years, the plaintiff counted that he and his wife by deed indented demised to the defendant all that third part to which *Elizabeth* his wife had right of dower of two messuages, and because he did not aver in his declaration that his wife had right of dower, the better opinion was, that he should be barred, and the indenture is not an estoppel by reason of the words "that third part" which ought to appear upon certainty, but here *non constat* that the wife had right of dower; as if a man leases to me by indenture all lands that he has by descent from his father, I may say that he had nothing by descent. Br. Condition, & 126. [See ante, 196. a. margin. notes to pl. 41. and note (a) to the same.]

Building on a man's own waste within a forest is a purpresture, but the Justice of the forest may suffer it to stand, and impose a rent on it.

Jenk. Cent. 5. c. 100. S. C. 3. Inst. 204.

[W. Jones, 277.]

(45) IT was resolved by the greater part of the Judges and Queen's Counsel this Term at *Serjeants' Inn* in the presence of the Earl of *Suffex*, Justice of the Forests on this side *Trent*, that the building of a new house in the several soil or waste of any man within a forest is a purpresture and nuisance to the forest and the game, and finable, or must pay a rent for the toleration or permission for it to stand at the judgment and discretion of the Justice, or is razeable, and to be destroyed at pleasure &c.

Atkins, in his reading upon the Statute of Forests in *Lincoln's Inn* August 1632, held, that the erection of a beacon on one's own land in a forest is a purpresture; and he cited one *& Bosbye's Case* which was at the last cyre at *Waltham*. A sum of money was devised by *Bosbye*, to erect a causeway in the said forest, which was done accordingly by his son, and he was fined for a purpresture. A man in a forest cannot cut down wood on his own land without view of the forester, [Fitz. Ab. tit. Treipals, 239.] Br. Forest. 6. but he may do it by prescription. Co. Lit. 115. [a. and Mr. Harg. note (15) in fol. 118. a.]

Heath

Heath against Atworth.

In B. R.

(46) A PARSON of a church within the diocese of *Winchester* made a lease for years, and afterwards was deprived by the Commissary of the Bishop of *Winchester*, and he appealed to the Archbishop of *Canterbury* in his prerogative Court of the *Arches*, pending which appeal, another is collated to the parsonage by the Bishop of *W.* patron &c. and he makes a lease for years to the Commissary aforesaid who gave the sentence of deprivation. And between the lessees there was a contention, and the first lessee brought an *ejectione firme* in which the deprivation above was pleaded by the defendant, and the appeal shewn by the plaintiff to have been made in manner and form aforesaid, where the * statute 24. H. 8. c. 12. limits, and prescribes the form, manner, and order in appeal, to be made within the realm and not elsewhere &c. And by the statute the appeal ought to be to the Archbishop of the province where &c. without limiting any court in particular. And therefore the defendant demurred in law to the appeal. And it was shewn in argument by the civilians, that the *Arches* is not the Court of Prerogative &c. But because the defendant demurred generally in law to the plea of the appeal in manner and form aforesaid alleged, without shewing to the temporal Court which is the Prerogative Court, of the jurisdiction of which the temporal Judges cannot be intended to be confusant &c. And at length in this Term it was the opinion of all the Judges of B. R. that the said words in the appeal, *s. in his prerogative Court of the "Arches,"* were void and superfluous, and the residue, *s. "to the Archbishop of Canterbury,"* sufficient to have the benefit of the appeal by the good equity and intendment of the statute aforesaid; for which see well the words of the statute.

To a plea of deprivation, replication that plaintiff had appealed to the Archbishop of C. in his Prerogative Court of the Arches; on general demurrer because the statute gives the appeal to the Archbishop of the Province, without limiting any court in particular, this Court rejected the words "in his Prerogative Court of the Arches" as surplusage,

Dy. 205. b. 20. H. 6. 25. b. 10. H. 7. 12. 29. E. 3. 16. 27. H. 6. Gard. 116. 118. 2. R. 2. Quare Impedit, 143. 3. Cro. 680. 42. E. 3. 14. b. Plow. 125. 6. Co. 13. b. 5. 51. b.

* [241. a.]

[3. Bl. Com. 64, 65.]

1. Keb. 157.

4. Inst. 337.

[5. Com. Dig. 34, 35 Dougl. 4. 667.]

(47) MEMORANDUM, That on the last day of this Term it was agreed by all the Judges in the

A sheriff's return to a *ca. sa.* of a rescous made from his bailiff itinerant

Hil. 41. El. C. B. The Court took a difference, *s.* If the sheriff return a rescous made to his bailiff, it is good where, by the return he took consufance of it himself: but if he return a rescous by the report of his bailiff, as in this case here "*be answered me thus,*" this is not good. And this difference was agreed to by WALMESLEY and ANDERSON and GLANVIL, in a case moved by Williams for divers poor men.

Trin. 42. El. B. R. The sheriff returned *rescussit ballivo*, and it was holden bad.

Yet see at this day the return is good, because he returns the truth of the fact; and so it had been taken *Mich. 23. & 39. Eliz.* upon a rescous returned by the sheriff of the county of *Hertford.*

Bench,

is bad: *scus* if it had been from the bailiff of a franchise. So on a *ca. sa. or ca. ul.* after judgment, if a rescous be made the sheriff shall be charged, unless it be by the King's enemies.

Jenk. Cent. 6. c. 1. S.C.
29. E. 3. 19. 39. H. 6.
42. a. 2. Ro. Abr. 456.
457. Jo. 201. 21. H. 7.
23. Rol. Contin. 78.
R. 44. 2. H. 4. 4. 3.
H. 7. 11. a. Fitz. 69. b.
103. d. 27. Aff. 65. 14.
Jac. Cro. 419. 1. Ro.
Rep. 389. 3. Eulst. 199.
1. Rol. Abr. 167, 268.
Went. 201. 4. Elz.
112. b. 3. 6 Co. 52. b.
54. 4 Co. 84. 10. H. 7.
26. 10. H. 8. 28. 28.
Aff. 46. 6. H. 7. 12.
38. E. 6. 66. 33. H. 6.
1. a. 16. E. 4. 3. a.
12. H. 1. Cro. 3.
[4. Bac. Ab. 402. 5.
Com. Dig. 439. Dult.
Sh. 217, 218. Imp. Sh.
183. 5. Burr. 2812. 2.
Term Rep. 5. 126. 4.
Term Rep. 789. Eul.
Ni. P. 63.]

Bench, that the return of a sheriff of a rescous made to his bailiff itinerant &c. by these words. *s. By virtue of this writ &c. I have commanded my bailiff itinerant &c. who has answered me thus, that he has arrested &c.* and shews the certainty of the day, year, and place &c. and that rescous was made &c. is not good, because this arrest is the proper arrest of the sheriff himself, and no credit is to be given to the word or answer of the bailiff itinerant. Otherwise is it of the bailiff of a franchise who has the return of writs and execution of the same, where *nullum dedit responsum* is a good return, upon which a *non omittas* shall issue. And in this Term the Judges of *B. R.* were of the same opinion in the return of a rescous by the sheriff of *Somerset* upon one *Reade of Lanzeport*. And also it was holden besides in the Bench, that if the arrest be by virtue of a *capias ad satisfaciendum*, or *capias utlogatum* after judgment, and a rescous made after the arrest at the same time, by which the party escaped, that the sheriff shall be charged for the escape with the condemnation, and shall have his remedy over against the rescuer by action upon the case: but if the rescue be by the enemies of the King it is otherwise.

* [241. b.]

In quare impedit against the Archbishop, Bishop, and Clerk, on default by all, damages shall be had against all: but the plaintiff must make title, and process shall go to inquire &c. and the jury find plenarity by the Clerk of the collation of the Archbishop, the plaintiff shall recover the presentation and damages.

Mo. 81. } S. C.
[Bendl. 149.] }
Hil. 7. Elz. Rot. 827.
10. Co. 118. b. Hob.
152. 154. N. B. 48. r.
Bendl. 117. 11. H. 6.
3. a. 1. H. 7. 13. 10.
H. 6. 4. Dyer, 135 269.
2. Rol. Ab. 387.
11. H. 4. 8. 6. Co. 51.
20. H. 7. Cro. 57. Dy.
104.
4. H. 7. 20. a. 12. Fl.
3. a. 10. Fl. 128. a.
Hob. 201. 2. Burr. 203.

Watson *against* the Archbishop of Canterbury and others.

(48) *QUARE IMPEDIT* was brought by *Watson* against the Archbishop of *Canterbury*, the Bishop of *Lincoln*, and one *Garth*, clerk, of the church of *Glatton* in the county of *Huntingdon*, and process continued against all until the grand distress returned, at which day all the defendants made default, upon which the plaintiff made title to the patronage to have a writ * to the Bishop; and a writ to inquire of the damages was awarded, and besides this, to inquire of the plenarity of the church, and of whose presentation, and how much time is elapsed from the avoidance, and how much the church is worth by the year. And all these points were returned by the inquisition: and it was found that the church became void three years ago, and remained void two years and upwards, and that the church is now full of the said *Gregory* of the collation of the said Archbishop. And by the opinion of the Court judgment was given that the plaintiff

plaintiff should recover the presentation; and he had a writ to the Bishop of *Lincoln* aforesaid, and damages to the value of the church for half an year &c. and all the defendants in *miserericordiâ*.

[Com. tit. Pleader;
(3. L. 11. 12.)]

Brooke otherwise Cobham's Case.

(49) **MEMORANDUM**, That after the end of this Term, one *Brooke, alias Cobham*, was arraigned in *Southwark* before the Commissioners of *oyer and terminer* for a heinous piracy and murder done to a Spaniard, and stood mute, and would not answer directly. The question was moved by the Attorney General, whether he ought to have judgment of *peine fort et dure* in this case? And as it seemed to SAUNDERS, Chief Baron, BROWNE and DYER, Justices, their opinions being asked in it, he shall have it. And this by the words and good and reasonable intendment of the statute 28. H. 8. c. 15. And according to the above opinion judgment was given by SERJEANT CARUS (a).

In piracies, the defendant standing mute shall have judgment of *peine fort et dure*.

1. Inst. 391. Dy. 222.
308. a. Co. Lit. 381.
3. Inst. 114.
Stat. W. 1. c. 12.
Stamf. 150.

[(a) ASH, in his Abridgment of these Reports, adds to this case, "*Et puiſt aver ſon clergie puis ſil uſt demande ceo per ſtat.*" 1. E. 6. ca. 12." but the edit. of DYER 1592 in the *Middle Temple* library, in the ſame hand as mentioned above, fol. 71. b. note (a), adds to this, "*Semble que il n'ave- ra clergie par ceo que piracie eſt ore d'etre*"

"*trie come robbery fait ſur la terre et auſſi*" 28. H. 8. c. 15. ouſta pirats de clergy et "*ſanctuary.*" And now by 12. G. 3. c. 20. perſons arraigned for piracy and ſtanding mute ſhall be convicted of the offence as if by verdict. See Bl. Com. b. 4. c. 25. and 2. Hawk. P. C. 264. 268.]

Michaelmas Term, 7. & 8. Queen Elizabeth.

Whiteacres and another *against* Thurland.

A *testatum ca. fa.* not being served in time, was altered to a later return day, and the defendant was arrested upon it, yet unsealed: the Court committed all who had any hand in the alteration and arrest, but as the plaintiff was wholly innocent the defendant was kept in execution.

[Moyle Ent. 25. S. C.]

Dyer, 244. b. pl. 61.

a. R. 3. 10.

[* 242. a.]

q. Co. 71. b.

(50) **M**EMORANDUM, That in *Easter Term* last, there was a *capias ad satisfaciendum* awarded at the suit of *Whiteacres and Day*, executors of one *Ward*, against *T. Thurland*, Clerk of the Closet, and Master of the Savoy, upon a *testatum* out of *London* into *Middlesex*, returnable in *Tres Trin.* which writ was delivered to the sheriff of *Middlesex* to be executed, in due time; but it remained in his hands unexecuted for a month and more after the day of the return. And after this one *Feake*, factor of the said plaintiff, had the said writ back out of the hand of the sheriff, and procured one *Turke*, clerk of *Master Lone* the prothonotary, to alter the *teste*, and to make the return *Tres Michael.*; whereas it was * before *Tres Trin.* And the entry of the awarding of the writ, being upon a *testatum* (or otherwise no entry of such writ is usual), not continued and made according to the writ until the beginning of this Term of *Saint Michael*, which was done by *Stebbing*, a clerk of *Lone*; and the writ so altered and unsealed was delivered back to the sheriff by *Feake*, who by virtue of this made a precept to certain serjeants of *London*. And they arrested *Thurland*, and led him to prison, after which arrest the writ was sealed, and brought back to the sheriff, (b) who declared these facts to the prisoner. Whether he thus arrested was in execution by this

(50) Note, the entry of the *capias ad satisfaciendum* is not usual, and for this *Coke*, Chief Justice of the Bench, said in *C. B. Trin. 8. Jac.* in the case of *Foster and Jackson* [2. Brownl. 321.] that this was the reason that after a *capias* one may have a *fi. fa.* or *elegit*, because there is no entry of record of the *capias*; and so is it of the *fi. fa.*; but an *elegit* is always entered of record in this manner, *elegit sibi fieri medietatem terræ*, and for this, contrary to such entry of record, he shall never have a *capias* or *fieri facias*. But he said that a cunning attorney would pray an *elegit*, and make no entry of record, and then upon the return of the sheriff of *nil habet* he may have a *capias* or *fi. fa.* for there is no election of record to conclude him. *Coke* also said that upon a *testatum* the entries of the *capias* or *fieri facias* are necessary, and yet upon return of *nulla bona* or *non est inventus* he may have *elegit* for it. [3. Inst. 295.]

(b) From this mark to "But afterwards" | "leffect de ceo al prisonam, et luy arrest fut in
I could make sense of it in no other way. It | "execution per cest arrest on breve nouvelment
is in the original thus: "Si cesty que declare | "seale on nemy, est le question."

arrest

arrest or writ newly sealed, or not, is the question. But afterwards, at the *Tres Michaelis*, the writ, being indorsed and delivered by the old sheriff to the new sheriff, was returned *cepi corpus*, and the body also was brought to the bar, where request was made by the counsel for the defendant to stay the acceptance of the writ till the practice was looked into; and so it was for four days; and the writ and body delivered to the sheriff &c. And there were four persons committed to the *Fleet*, *s. Feake*, who procured the said writ, *Turke*, *Stebbing*, and the Clerk of the under-sheriff, and process against the sheriff. Afterwards, upon examination of the executors upon oath, it appeared to the Court that they were clear of all the covin and injustice of the practice; and upon their request at the bar against the prisoner that he might be committed to prison for the execution; the writ was received by the order of the Court, and *Thurland* committed to the *Fleet* &c. on the 14th day of November in this Term.

[See Cowp. 9. a. Black. Rep. 83. 1190. 2. Hen. Bl. 29.]

2. Inst. 460. b.

(51) *SCIRE FACIAS* upon a recognizance: the defendant demanded *oyer* of the condition, which being heard, it appeared that it was to perform the award of two Knights in two points only, *viz. for and concerning the right, title, interest, and possession of a certain parcel of land containing by estimation two hundred acres called Kelsfornelinge, and all actions, suits, &c. depending between the parties for that land; so THAT &c. before a certain day &c.* The defendant pleaded that after the recognizance, and before the day &c. the arbitrators aforesaid did not make and deliver in writing indented and sealed any award &c. *of, for, and concerning the said parcel of land called &c. and all actions, suits, &c. concerning the same &c.* Note the plea in the doubleness: The plaintiff set forth the award in certain; which was in divers other points which were contained in the submission and condition; and to the said parcel of land they gave no name, but that in the waste lands in the vill of *Kelsforne* they awarded, *that the defendant should have the brakes there grow-*

Mich. Uk. Rot. 1887.

Submission to arbitration of all property and interest in K. and all suits concerning the same, *ita quod &c.* Award only of brakes in K. is bad, because; 1. The submission being conditional, the award must take in every thing submitted. 2. The property is not awarded; but only a profit out of the land. 3. Although they intended to award the place itself, they have not named it, and then no averment in the pleading may declare their intent.

[See Dy. 416. b. 443. b.]

Dy. 183. 11. H. 7. 2. S. Co. 30. a. 98. 5. H. 7. 71

(51) In debt by *Φ. Fretwell v. White*, on a bond to stand to the award of J. J. the arbitrators awarded that ten pounds should be paid to a stranger to the award, wherefore it was adjudged against the plaintiff: and although the truth was that the said stranger was attorney to the plaintiff, and received this for his master by the intent of the arbitrators, yet because it was not expressly recited in the award that he had the ten pounds for his master, therefore insufficient. *Trin. 3. Jac. B. R.* [1. Lord Raym. 123. 2. *Id.* on Awards, 104.]

ing during his life, paying to the plaintiff annually two shillings for the moiety of the royalty of the said brakes, which appertained to the * said plaintiff; and so concluded, "as in the said award among other things more fully appears," without making mention of *actions, suits, &c.* and then assigned the breach in the non-payment of the said two shillings, with this affirmative averment after it, "that the said parcel of land where the brakes grow is the said parcel of land called *Kelstornelinge*, for the right, title, interest, and possession of which the parties put themselves in arbitration," without saying "*and not other or different*," nor did they refer this to the condition &c. upon which the defendant demurred in law &c. (52) And it was argued by PON-

[Kyd on Awards, 116, 117.]

TRELL that the award was void in the whole, because the thing in submission was not touched by the arbitrators; but CARUS and HARPER to the contrary, and that by this averment the thing is sufficiently touched &c. And at length the Justices declared their opinions in the matter, and all held against the plaintiff. And the reason of three of them was, for that the award was void, because they do not award for both points, but for one only, and their authority was restrained and conditional by the words "*so that &c.*" And there is a difference between a simple submission by parol of two things, and the arbitrators make award of the one only, this is good for so much &c. Also the award was not of the property, right, and possession of *Kelstornelinge*, according to the condition, but of the brakes growing in it, which is only parcel of the profits of the soil &c. Also the award is not referred by the arbitrators to the thing in submission, nor any generality comprehending the thing, but of another matter.

[Kyd on Awards, 114. &c.]

22. H. 6. 46. b. 7. H. 6. 43. a. 17. H. 7. Cro. 43. 39. H. 6. 11. 19. H. 6. 6. Arbitr. 5. 8. Co. 98. a. 10. Co. 131. b. Dy. 243. b. Br. Arbitrement, 20. 29. 4. Eliz. 217. a. 1. Ro. Abr. 263. (Q) 5.

[Kyd Awards, 131.]

3. Bulstr. 68. 9. E. 4. 44. 1.

[Kyd on Awards, 139.]

4. Co. 71. Dy. 277. pl. 52. 1. Sand. 32, 33.

And the averment of the party that all is one, as above, cannot expound the intent of the arbitrators. And also the form of the averment above all in the affirmative without concluding negatively, i. "*and not other or different*," as the usual form is, is not good. And then the negative plea which the defendant has pleaded above as well for the actions and suits &c. as of the land, is not comprehended by the plaintiff, only in one of them &c. See more of an award and the pleading of it in the next page.

Onflowe's Case.

(53) **I**F perjury be voluntarily committed in *B. R.* by any testimony or proof, on a suggestion for a prohibition there granted against an ecclesiastical Judge according to the statute 2. and 3. *Ed. 6. c. 13.* by which the party is stayed from a consultation; Whether it can be examined and punished in the star-chamber, or not, was a great question between my Lord Chief Justice of England, and Onflowe, Recorder of London, for his brother; for which cause all the Judges were assembled at *Serjeants Inn*, and perused the statutes of 3. *H. 7. c. 1.* and 11. *H. 7. c. 25.* and the proviso for the star-chamber in the act * of perjury in the 5th year of the now Queen, c. 9. And they thought that it was not, for the statute 3. *H. 7.* does not provide any punishment for perjury, any more than it does for murder, although it is mentioned in the preamble to follow maintenance, and others the misdemeanors first recited. And this may appear by the conclusion of the punishment of the offenders, which ought to be according to the laws and statutes before provided; and there was no law for perjury before this time but attain &c. Also the statute 11. *H. 7.* was not necessary to be made against perjury, to be punished by the discretion of five persons there authorized, if there had been other means of doing it &c. Also the statute of 11. was continued only to the 12. of *H. 7.* and from that by the act e. 2. until the next parliament, which was in the 19. *H. 7.* and then expired, so that the authority claimed in the star-chamber was not in being nor restrainable at the making of the act of the 5. of the now Queen, for a thing which is not cannot be restrained. (54) Also it is very uncertain to which of the said statutes of *H. 7.* the proviso for the star-chamber extends: if it be to the last, then it had no existence at the time of the making of this proviso.

Also the conclusion of the proviso is, that they may proceed there &c. in such wise as they might have done and used to do before the making of this act to all purposes, so that they set no less punishment than is contained in this act &c. And if they could not do this of right, the usage could not give them authority, for it is a copulative; wherefore &c. See more in the paper of Abridgment of the Statutes afore-said. And the case was debated by the counsel of the parties

Perjury in the proof of a suggestion to obtain a prohibition in *B. R.* is not punishable in the star-chamber.

[3. Inst. 164. 166.]

Noy. 6. Co. pl. Cor'. 164. contra.

Dyer, 302.

* [243. a.]

[Cro. El. 148. 1. Hawk. P. C. 330.]

8. H. 7. cap. 13; Dy. 288. a.

3. Cro. 521.

7. H. 6. 25.

[2. Haw. P. C. 319. 3. Com. Dig. 146—149. See stat. 2. Geo. 2. c. 25. 23. Geo. 2. c. 11. and 1. Term Rep. 69.]

Usage cannot give a court authority where it had not right to act before, by reason of the words: "as they might have done and used to do &c."

[Where usage may explain a stat or charter, 1. Term Rep. 727. 3. Term Rep. 279. 288. notes.]

before the Council of our Lady the Queen in the inner star-chamber, *qui avifare vol.* See 13. E. 4. for the star-chamber, fol. 9. (a)

(a) But 16. Car. 1. c. 10. having recited in the 2. sect. that all matters examinable in the star-chamber might be examined and redressed by the common law, by the third sect. dissolved that court, and all jurisdiction, power, and authority thereto belonging.

If of three coparceners one aliene, no writ of partition lies upon the statute by the others, because they have a writ at common law. If both join in a writ against the alienee, and one is non-suited, shall he shall be summoned and severed, and his part set out as well as the rest. If of three, the eldest purchase the part of the youngest, or if her husband do, the writ lies for them at common law against the other.

[Bendl. 152.] Ben. in Keilw. 211. b. N. Ben. 20. S. C. Co. Lit. §. 264. 11. Co. 64. Jen. Cont. 4. esp. 96. 1. Ro. Rep. 243. Lit. 276. F. N. B. 61. 8. El. Bendl. pl. 17. 4. Mar. Bendl. pl. 8. N. B. 61. c. Between Bafford and Ballard, of land in Gavelkind, Lit. 50.

[Robinson Gayelyk, 109. And see ante, 128. a. pl. 53.]

* [243. b.]

Submission to arbitration, *ita quod ita be yieldd as or before the 23d.* Plaintiff said that the arbitrator by his award *delivered* before the 23d did award. This is all pleaded, for it should be averred expressly that they *yieldd* it, and this in the disjunctive words of the condition *as or before the 23d*, and not *before* only. And the word *delivered* does not correspond with the word *yielded*; *reddidit*

(55) THERE are three coparceners, and one of them alienes all that belongs to him in fee. And afterwards one of the other coparceners brings a writ of partition against the other and the alienee upon the statute [31. H. 8. c. 1.]; and because he may have a writ in this case by the rule of the common law, the opinion of the Court was, that the writ should abate; but if the two coparceners had joined against the alienee, although one had been non-suited, yet he should be summoned and severed, and his part should be parted and severed as well as the other two parts. Yet *quare* this. See for the first point, H. 2. and 3. P. and M. fol. [128. a. *supra.*] accordingly. And by the *Register* [fol. 76. a. b.] if the husband of one of the three coparceners purchase the part of one of the others, he and his wife shall have a joint * writ special at the common law against the third. So it seems if one of the three purchase of another his part, the purchaser shall have such writ against the third &c.

(56) DEBT on bond, with condition to perform the award of two, of all actions and quarrels depending in variance between the parties, "*so that the same arbitrament were made and yielded to the said parties by the arbitrators in writing at or before the 23d of July &c.*" The defendant pleaded, *protestando* that the said arbitrators did not make any award between the parties &c. for plea, that the said arbitrators, after the making of the writing aforesaid, and before the aforesaid 23d day of July, did not deliver to the said parties any award in writing of and upon the premises in the indorsement aforesaid specified &c. to which the plaintiff replied

replied that the aforesaid arbitrators after the making of the writing aforesaid, *and before the said 23^d day of July, s. at N.* aforesaid, at the special request of the said parties, having taken upon themselves the burthen of the arbitration &c. by their award in writing made and to the parties aforesaid by the said arbitrators *then and there delivered* according to the form and effect of the indorsement aforesaid, reciting by the said award that, whereas &c. they the said arbitrators awarded that &c. and shewed the whole of the award, which was, that all suits and quarrels should cease and determine, and that the defendant should pay to the plaintiff forty pounds, for recompense of a slander &c. and assigned a breach in the non-payment &c. and upon this the defendant demurred in law, (57) And the cause was, because the plaintiff does not answer directly to the plea of the defendant, *s. to the delivery of the award by the arbitrators in writing &c. but by a glance and argumentatively; for they ought to have expressly alleged that the arbitrators made the award, and have shewn it in certain, and that they delivered it to the parties in writing &c. And note, "that no award in writing by the arbitrators aforesaid was delivered,"* had been more apt and agreeable to the words of the condition than as above; and yet it seems good enough as above, according to 6. H. 7. [4. 2.] that the counsel did not give advice, where the words of the condition were, that advice should be given by counsel; but the sense is equivalent &c. And note also, that the plea in bar above should be "*before the said 23^d day of July, OR on the said 23^d day &c.*" according to the disjunctive condition above. And note also that the word *yielded* is answered and satisfied by that word *deliberat*, *quere* if well, for the word *redditum* had been more apt &c. but all the Judges argued against the plaintiff.

would have been more accurate.

[Vide ante Dy. 217. 242. b.]
8. Co. 98. a. 82. a.
1. Rol. Rep. 377.

Dy. 184. 218. b.

5. 20. H. 7. 12. 4.

1. H. 7. 5.

Br. Conditions, 133.

[But see Cro. Jac. 285. that this allegation of delivery by inducement is sufficient, and Kyd on Awards, 194.]

* Sir Giles Dawbeney against Davie.

(58) **MEMORANDUM**, That one *Nicholas Davis*, attorney of C. B. by the addition of, husbandman, was so condemned in the Bench by bill of debt at the suit of *Sir Giles Dawbeney*. And about the octave of *Mich*, the plaintiff had a writ of *capias ad satisfaciendum* directed to the sheriffs of *London*, returnable on the octave of *Hilary*,

* [244. a.]

After error brought defendant was taken on a *ca. sa.* issuing out of C. B. but sealed with the seal of B. R. on suggestion of which he was immediately discharged, and the Court committed the plaintiff's attorney,

3. E. 4. 26. b. 20. H. 6. 42.
 Every writ of error is a superfluous of itself. 6. H. 7. 16. 22. H. 6. 41.
 3. H. 4. 6. Br. Error, 66. Dy. 242. a.
 [2. Bl. Rep. 1183. 1. Term Rep. 270. 3. Term Rep. 390. and see ib. 643. 4. Term Rep. 436. Hen. Bl. 432.]

[3. Burr. 1600. 1. Hen. Bl. 9. 10. 2. Hen. Bl. 79.]

which he was arrested. And upon a suggestion or *testament* made to the Court that the said defendant, immediately after the judgment given, and before the issuing of the writ aforesaid, delivered a writ of error, bearing date the 10th day of *October*, in the same *Michaelmas Term*, to *NEWTON, Chief Justice*, which all the Justices remembered; and besides that, the said writ of *capias* was not sealed with the seal of *C. B.* but with the seal of *B. R.* And a *habeas corpus* was awarded to the sheriff of *London*, returnable on the *Sunday* next, *s.* on the 16th of *October*, and at that day the body was brought; and this matter of the seal was confessed by the attorney upon his oath. And then, as well for the one cause as for the other, the defendant was dismissed at large, and the attorney of the plaintiff was committed to the *Fleet* until &c.

Stepkin against Lord Wentworth and others.

In assize for three tenements against four, of three of them each claims one, and the fourth claims tenancy of the whole, *sans ceo* &c. the plaintiff is driven to elect his tenant at his peril.

2. H. 4. 7. 7. H. 4. 2. b. 34. H. 6. 16. b. 8. 41.
 44. Aff. 1. 1. 32. 13. H. 7. 21. a. 33. H. 6. 36. 44.
 E. 3. 23. 20. Aff. 4. 10. H. 6. 2. a. 9. E. 4. 36. b. 3. H. 4. 16.
 [Booth Real Act. 277, 278.]

(59) **A**SSISE brought for a freehold in the parish of the blessed *Mary of Matfelone* which is *Whitechapel* parish without *Aldgate, London*, by one *Stepkin* against the *Lord Wentworth* and three others. And the plaint was of three messuages with their appurtenances: and the three severally took an entire tenancy, *s.* each of a several house, and pleaded several special bars for each house; of which each took the tenancy, and to the residue, *nul tort*. And the *Lord Wentworth* took the entire tenancy of all three, *without this* &c. and pleaded also a special bar. And it was holden by the opinion of the Court, that the plaintiff is driven and compellable in this case to elect his tenant at his peril, and so he did,

Montgomery's Case.

On the grant of an advowson to a bishop and his successors after the death of the then incumbent; a lease by the bishop to commence when the advowson falls in, is void against his successor if the incumbent survive him.

1. Coke 155. a. 10. 48. a.

(60) **K**ING *Ed. 6.* being patron of a church full of an incumbent, by his letters patent granted the advowson to the Bishop of *Litchfield* and *Coventry* and his successors; and further by the said letters patent granted, that after the avoidance of the church by death, resignation, or otherwise, the said Bishop and his successors should hold the said church to their proper use. And afterwards the said Bishop

Bishop made a lease by indenture for sixty years to commence at such time as the said parsonage should come to the hands of the said Bishop or his successors by the death, resignation, or otherwise of the incumbent; which lease is confirmed by the Dean and Chapter. The Bishop died, the incumbent died, the successor of the Bishop entered, and made a lease for twenty-one years to *Montgomery*. Whether it be good, or not, was the question by my Lord Keeper &c. And * it was resolved to him by all the Judges, that the first lease was void, because the lessor had nothing in the parsonage impropriate during the life of the incumbent who survived the lessor.

Co. Lit. 352. b. 11. Co. 11.
6. H. 7. 13. b. Dy. 239. b.
50. E. 3. 27. a. Plow. 499.
b. 11. El. 279. a.

Dy. 69. a.

22. E. 4. 37.

[A possibility coupled
with an interest may be
devised. Hen. Bl. 30.
3. Term Rep. 88.]

* [244. b.]

Plowd. 500. b.

A similar case was afterwards in the Chancery between *Jobson* and *Michael* for the parsonage of *Cottingham* &c. belonging to the Bishop of *Chester*, and parcel of the endowment of the said bishoprick, which was ruled according to the said opinion, by the award of *DYER Justice*, and *WELSH Justice*.

JOHNSON V. MICHAEL.
[Watson Cler. L. 424.]

Thurland's Case.

(61) **A** MAN condemned in debt, at the request of an agent of the plaintiff, was arrested by the sheriff for the debt without any writ or warrant, and being in the custody of the sheriff, the sheriff and the agent procured a *capias ad satisfaciendum* out of the Bench where the condemnation for the debt was. And by this writ he arrested the prisoner again, and brought him into the Bench at the day of the return, and returned the writ also *cepi corpus*. And this matter is disclosed by the defendant to the Court (who by examination find it true), with a request to the Court that they would reject the writ and return. And the plaintiff himself prayed the contrary; and also prayed the Court that they would commit him to the prison of the *Fleet* in execution of the debt. And upon great consideration the prayer was granted to the plaintiff, because he was not *particeps criminis* in this undue arrest, which was tortious to the party defendant, of which injury or fraud the plaintiff should not have any advantage, although there followed a legal act: and also a writ of false imprisonment lies against the agent of the plaintiff and the sheriff, in which the party shall re-

Plaintiff's agent and the
sheriff arrest the defend-
ant, and afterwards
procure a *ca. sa.* to war-
rant it, both are fined
for this. But as the
plaintiff was innocent,
the Court kept the de-
fendant in execution.

8. E. 4. 17. b.

Ante, 50.

43. Eliz. c. 6.

Dy. 249.

19. H. 8. 12. b.

14. H. 8. 16.

[Cowp. 9. 2. Black. Rep.
823. 1190.]

16. E. 4. 8. 2.

13. H. 7. 2.

5. F. 4. 7.
Supra, 243. b.

[17. E. 3. 44. pl. 42.]

Bar. 248.

[6. Geo. 1. a. 21. §. 53.]

6. Co. 54.

cover damages as well for the last arrest and continuance of the imprisonment as for the first, *quare hoc*. (62) But because the plaintiff was found clear and free of the injury and covin in the purchase of the writ, therefore the defendant by the judgment and opinion of the Court shall be committed to the Fleet there to remain until &c. And the sheriff shall be amerced ten pounds, and the agent five pounds. And this was the case of *Thurland*, *supra* [fol. 241. b.] in this Term, And by the order of the Court a solemn entry in the office of *Lane* was made this Term of the whole of this case. See of arrest made first without warrant and afterwards a warrant is obtained for the purpose, *M. 18. E. 3.* [35, b, pl. 18.] in debt against the bailiff of a franchise.

* [245. a.]

On delivery of a writ of error to the Chief Justice, or Clerk of the Treasury, the Court must not award execution, if the plaintiff prosecute to have the record removed before the day of the return, otherwise they may. But in the case of a *certiorari* to Justices of Peace they never can proceed afterwards.

Co. Lit. 260. a. Hob. 116. pl. 9. Dy. 75. pl. 34. 1. Ro. Rep. 22. R. 207. Br. Superfedeas, 24. 8. 13. E. 4. 7. 4. a. 19. H. 6. 8. a. 16. Eliz. 329. 9. H. 5. 13. a. 5. H. 7. 22. b. Dy. 99. pl. 55. Yelv. 32. 1. Kebl. 93. Crompt. 102. 117.

[2. Crompt. Pract. 345. Com. Dig. Pleader, (3. B. 12. & 13.) 2. Bl. Rep. 1183. 1. Term Rep. 270. 3. Term Rep. 390. and see ib. 643. 4. Term Rep. 436. 1. Hen. Bl. 432.]

[3. H. H. P. C. 213. 215. 2. Com. Dig. 231. 24. 1. Hawk. P. C. 292. Vide ante, 187. a. pl. 6.]

(63) IF a writ of error be brought to remove a record in *C. B.* before our lady the Queen wheresoever &c. at a day certain; and this writ be delivered to the Chief Justice to whom it is directed, or to the clerk of the treasury of *C. B.* and the party do not prosecute to have the record removed before the day * of the return, but let it remain, on purpose to delay the execution of the plaintiff, which is a common practice at this day; it was much debated among the Judges at *Serjeants-Inn* in *Fleet-Street*, Whether the hands of the Justices of *C. B.* are foreclosed from proceeding, as a *superfedeas* in law, as well after the day of the return of the writ of error, as they were before. And by the better opinion of 6. *H. 7.* fol. 16. they may award execution after the day of the return (no suit being made by the plaintiff in the writ of error for the certificate of the record, which is the default of the plaintiff himself). But of a *certiorari* to justices of the peace, although the day of the return be passed, yet that is a *superfedeas* from proceeding upon the indictment, for there are express words to stay it, *s. because that the King willeth not that the said felony be determined elsewhere than before himself &c.* Therefore there is a difference between the cases. And *Christopher Hole* the secondary of the treasury, and an ancient attorney and practiser in the office of the clerk of the treasury at (a) *Hell*, affirmed that the usage and order in the time of one *Brudnell*, and afterwards, was according to the above opinion of 6. *H. 7.* 16.

(a) See the note on "carries poor souls to Shakspeare, Lond. 1793. vol. 7. p. 27," "Hell," in Mr. Steevens' New Edition of

Lady Maltravers *against* Powel.

(64) **A**T *nisi prius* a full jury of thirteen appeared, and the defendant challenged the first juror, and all peravail; and two triors were assigned, and all the ten remaining were challenged for favor or for hundred: and the challenge was found true, and the suspected were drawn, and the residue were made out of the hundred, all except one who was sworn upon the principal; and the plaintiff prayed a *tales de circumstantibus*, and had it &c. before SAUNDERS Chief Baron, and CARUS, and well, as seemed to the Court in Banc afterwards, notwithstanding the words of the statute 35. H. 8. c. 6. which are, *that the Justices may proceed to the trial of every such issue with those persons that were before impannelled and returned, and with those newly added and annexed to the said former panel by virtue of this act &c.* which word *persons* is the plural number of both parties, yet if eleven appear of the first panel, one more may be added to them *de circumstantibus* to make a full jury. And so was the intent of the makers of the statute, and so in the other case &c.

One of the principal panel may be joined to eleven *tales*, or one *tales* to eleven of the principal, notwithstanding 35. H. 8. c. 6. speaks in the plural number only.

Dy. 338. b. 200. b.
Stamf. 155. b.

And BROWN held, that if two only of the principal panel appear, and at the prayer of the plaintiff twelve *circumstantes* are returned, and then the two principal drawn out by the challenge, then the trial shall be all by the twelve *circumstantes*, and none of the principal panel: yet *quære* well of this whether it may be by the statute. But at common law the jurors of the *tales* shall pass in trial without any one being sworn of the principal panel.

Whether trial may be by twelve *tales* only.

10. Co. 103. b. 105. 107.
Dy. 376. b. 34. H. 6. Enquest, 30. Dy. 78. pl. 41.

[Sel. Caf. Evid. 110. 2.
Hawk. P. C. 575. 2. H.
H. P. C. 265. 3. Bac.
Ab. 248, 249.]

* Verney otherwise Joyner's Case.

* [245. b.]

(65) **M**EMORANDUM, That it appears by ——— in the 34th year of H. 6. Rot. 37. in B. R. that one Verney otherwise Joyner of London, Gentleman, who was

A prisoner in the Fleet procured his indictment for felony, that by confessing it he might have

(65) * *Atkinson's Case*, 16. Jac. He was indicted of robbery, and afterwards was pardoned, and discharged of the felony, and notwithstanding he was detained in prison for a debt due before.

* *Beverly's Case*, 30. Eliz. Rot. 139. or 135. or 1359. where judgment was given against one in debt, and the defendant suffered himself to be outlawed in felony to the intent to defraud his creditor, and afterwards purchased a pardon, and had restitution, and the plaintiff sued execution, and had it for the manifest fraud. [1. Wils. 217. 1. Black. 30. 1. Hen. Bl. 129. 3. Term Rep. 730. 734.]

a pri-

his clergy and defraud his creditors, and got a *bab. corp. cum causâ* into *B. R.* but the King directed the Judges there to surcease from proceeding on his arraignment until further order. In the mean time a creditor acknowledged satisfaction in *B. R.* of a debt recovered in the Exchequer.

Co. Lit. 130. a. 3. Cro. 516. 1. Ro. Ab. 219. 2. 4. 6. E. 4. 1. 8. b. 4. b. 6. H. 6. 6. 7. H. 4. 7. 15. 20. Dy. 60. 65. 67. 3. Inst. 213. 215. Noy. 1. Ow. 69.

Dy. 213, 214. 249. b. Stamf. Prerogat', 108. Br. Execut', 98. Br. Privilege, 33. 31 Plow. 20.

[2. H. H. P. C. 145. Barnes 223. Salk. 350. Ld. Raym. 789.]

5. Mar. 152. a. Dy. 197.

a prisoner in the *Fleet*, as well for large sums of money due to the King and divers subjects whereof he was condemned in the Exchequer, and also in *C. B.*, as for fines to the King for denying his own deeds in *B. R.* and in the Exchequer, procured himself by fraud to be indicted of felony to the intent to defraud his creditors of their debts; and procured himself to be removed out of the *Fleet* by a *corpus cum causâ* directed out of *B. R.* to the Warden of the *Fleet* to be committed to the Marshal. (66) And all these causes above were returned into *B. R.* and the King perceiving by credible information the intent of the said *Verney alias Joyner*, and of divers others practisers of such frauds to deceive their creditors by such procurement of indictments of felony, and to be arraigned thereupon, and then confess the felony, and betake them to their clergy to the intent to be out of the temporal laws, and afterwards by their means to make their purgations and depart &c. the King by privy seal directed to the Justices of his Bench, commanded them to surcease from proceeding to the arraignment, until they had commandment from him and his Council to the contrary. And afterwards one of the creditors acknowledged satisfaction of a debt recovered in the Exchequer before one of the Justices of *B. R.*, witnessing it, and entered it in *B. R.*: and judgment *quod esset inde sine die &c.* whereas it should be *quod esset inde quietus*.

Hurst v. Mallorie et alios.

On a *pluries replevin* to the Sheriffs of London, return of a custom ratified by Parliament to replevy in the Sheriff's Court there, and not by the King's writ, is bad; and attachment granted against the Sheriff.

[Benl. 158. S. C.]

Jenk. Cent. 6. cap. 2. S. C.

9. Co. 27. 2. Inst. 282. 9. H. 6. 18. 23. Br. Retorne de Briefe, 46. 1. Kebl. 868.

(67) A *PLURIES REPLEVIN* issued out of the Chancery returnable in the Bench this Term at the suit of one *Hurst*, a citizen of *Exeter*, for certain goods and chattels taken in *London* by *Mallorie*, Knight, late Mayor of *London*, and others: and the writ was returned by the Sheriffs of *London*: and the effect of it was, that the custom within the said city from time whereof the memory &c. was such, that whensoever any goods or chattels by the law of the land repleviable were taken there, that then they ought and were accustomed to be replevied only by the ministers of the Sheriffs of the city for the time being, by virtue of a plaint le-

(67) The writ was returned in such form, "to the Justices of our Lady the Queen we certify," whereas it should have been "to the Justices named in a writ to this schedule annexed." Bendl. fol. 158. cap. 218.

vied in the court of our Lady the Queen and her proge-
nitors before the Sheriffs of the said city; and not by royal
writ issuing out of the court of Chancery. And the custom
was ratified and confirmed among others by the authority of
Parliament in the (a) 5th year of *Edw.* 3. and also that they
were bound by their oath to observe the customs &c. without
violation, wherefore they cannot, nor ought to make * exe-
cution of the writ &c. And by the opinion of the Judges of
both Benches, this return is insufficient. And another writ
of *pluries replevin* was awarded to the now Sheriffs, and pro-
cess of contempt to attach the late Sheriffs &c. And after-
wards the matter was compounded &c. See the like in the
Nativo Habendo 7. & 8. *H.* 6. [31. b. pl. 27.] and the end
of this matter in the 12th year of *H.* 6. in *Hil.* Term,
Rot. 316. where the Mayor and Commonalty of *London*
came and affirmed the return and the custom aforesaid. See
the statute of *Marlberge*, c. 21. It seems that at common
law the Sheriff cannot make replevin without writ. And
note in the principal case that the plaintiff had deliverance of
his goods at last. And by their attorney a *non est informatus*
was entered. And by a writ of inquiry of damages, found
by a jury of *London* only forty pence damages. But *quære*
well, Whether the defendants have a day in court to plead
upon the *pluries replevin*.

* [246. a.]

3. Cro. 353.

Finch. 116.
16. H. 7. 2.7. E. 4. 9. Dy. 189.
43. E. 3. 26. 22. H. 6.
21. 2. H. 7. 5. b. 1.
Ro. Abr. 581.[Fitz. N. B. 155. note
(b). Gilb. Replev. 74.
77.]

(a) Benl. in the return at length, has
quinto decimo, but no such act is in the Sta-
tute Book. By 3. E. 3. c. 1. Magna Charta | is confirmed, which c. 9. confirms the customs
and liberties of London; and so does 14. E. 3.
ft. 1. c. 1.

(68) **A** FEME SOLE acknowledged her right to her land
for the levying of a fine before commissioners by
a *dedimus potestatem*, at which time the writ of covenant was
pending as it ought, and at the day in Banc, when the record
of the final concord should be made, she is covert of a hus-
band: and notwithstanding this the fine is recorded and en-
grossed as levied by a feme sole. Whether this fine shall
bind the husband, or not, was the *quære*. And many of the
Judges held the fine good, because the taking of a husband
was after the *teste* of the writ of covenant, and of the *dedi-
mus potestatem*, and also the consuance made, which is the act
of the woman, and so the fine good. But the death of either
party,

A feme sole having ac-
knowledgeed a fine be-
fore commissioners, mar-
ried before the day in
Banc, yet the fine is
good.

1. H. 7. 9. 4. Co. 61.
West's Precedents Fine,
fo. 46. sect. 156. 11.
H. 7. 19. b. 1. Inst.
383. a. 2. Sid. 55.

15. Jac. Cro. 449. 3.
Cro. 469. 5. Co. 39.
162. 10. H. 6. 13. 1.
Mx. 87. b. 33. H. 6.
52. b. 5. El. 220. b.
Infra, 254. a.

Br. Fine levy, 10.

[See Cruise, Fines, c. 3.]

party, which is the act of God, and the writ by that abates; dissolves the whole. So a diversity—*sed quere*. But it was holden without doubt, that a release of the husband to the conusee of all his right makes all clear, for the wife and her heirs shall be bound for ever: This case was the case of the Lord Keeper of the Great Seal.

Lease for twenty years by tenant in tail to commence at Mith. following, is good.

3. Co. 70. b. 6. Co. 33. a.

Reg. 755. 2. Kebl. 252.

3. Mar. 123. a. 5. Co.

6. a. By the stat. 32.

H. 8. c. 28. the demise

ought to commence from

the day of the date.

Dy. 279. a. 1. Leon.

248. 3. Kebl. 109. 197.

[3. Bac. Ab. 322. Shep.

Touch. 275.]

(69) **TENANT IN TAIL** makes a lease for the term of twenty years rendering the usual rent, the term to commence at the Feast of *Saint Michael* then next ensuing: **BROWNE**, and **WESTON** held, that this lease should not bind the issue, because it does not commence at the time of the making of the lease, according to the proviso of the statute 32. H. 8. [c. 28. § 2.] But others thought otherwise: for the intent of the makers seems to be, that the lease shall not exceed the number of twenty-one years from the time of making the demise, no more does the other lease above: *Ideo quere*.

(69) *Tomson and Trafford's Case*, B. R. 35. Eliz. [2. Leon. 188. Poph. 8.] adjudged by the whole Court, that it is a good lease, warranted by the statute. Co. Lit. 44. a. that it is not good, if it does not commence from the day of the making, & fol. 45. a.

* Hilary Term,
8. Queen Elizabeth.

[246: b.]

Burdet against the Bishop of Sarum and another.

BERKSHIRE.

(70) **I**N REPLEVIN by *Burdet* against the Bishop of *Sarum* and another, the Bishop pleaded that he did not take, and the other made cognizance as bailiff to the Bishop in another place for *damage feasant*, and shewed that the cattle had escaped into the place supposed in the count as they were driving to pound, and that upon fresh suit they retook in the said place as the plaintiff supposed: and the plaintiff entitled himself to the place contained in the count, and traversed the taking in the other place alleged by the defendants; whereupon they were at issue, and one *venire facias* awarded to try both the issues; and on the appearance of the jury in the Bench, the array was challenged by the Bishop because no (a) Knight was returned upon the panel. And by the opinion of the Court, this challenge shall serve for the others also, because it was one entire panel according to 9. E. 4. [27. b. pl. 40.] in appeal against several; who pleaded not guilty, and one *venire facias* alone awarded; and a juror was peremptorily challenged by one of the defendants, and not by the others, yet was he withdrawn as against all: and the like was done *M.* 3. *H.* 4. 11. [5. b. pl. 25.] in ravishment of ward, and *E.* 7. *H.* 6. 1. protection cast for a default in trespass after issue. And for the pleading in the case above see well *M.* 34. *H.* 6. fol. 18. & *Ret.* 662.

Where several defendants in replevin are at several issues, and but one *venire* is awarded, a challenge of the array by one is good for all.

17, 18. E. 3. 72. 53.
34. H. 6. 18. Co. Lit.
156. a. 1. Ro. Ab. 320.
a. Ro. Ab. 34. 637.

13. E. 3. Chall. 115. 5.
H. 5. 7. 2. B.N.C. 221.
328. 465. 2. Mar. 107. b.
27. H. 8. 22. b. Bro. tit.
Trial, 142. Plow. 117.
Stamf. 153. a. 50. E. 3.
1. 30. Aff. 41. 5. Mar.
152. b. 4. H. 4. 6. a.
Br. Chall. 48. 26. 7. 22.
H. 6. 23. 4. a. Dy. 134.
3. H. 4. 6. b. Crompt.
85. Br. Chall. 84. 107.

[9. St. Tr. 12. 2. H.H.
P.C. 263. 268. 2. Hawk.
P.C. 573. 580.

(a) By 24. G. 2. c. 18. § 4. no challenge | panel.
shall be allowed for want of a knight on the |

Carew and his Wife against Marsh.

(71) **I**N ASSIZE by *Carew* and his wife against *Marsh* of a freehold in *South-Mymmes* the plaint was of one messuage, forty acres of land, forty acres of meadow, one hundred acres of pasture, and thirty acres of wood, with the appurtenances; the defendant pleaded a lease for years made by a stranger, s. *Fortescue*, to him, by indenture made at *South-*

In assize the tenant may plead a lease for years by a stranger, and *sa eius sans tort* without giving colour to the plaintiff. None but tenant of the freehold can plead in bar.
Lease for years in the county of A. of lands in

A. and in the county of *B.* will pass both; but of a freehold there must be livery in both.

Dy. 207. pl. 14.

[See Co. Lit. 228. b.]

31. Aff. 7.

18. E. 4. 1b. b.

Br. Affize, 390.

4. H. 6. 27. a.

Lit. 86. b.

Dy. 292. pl. 72.

[Booth. Real Act. 275, 276.]

[Vide ante, 207, pl. 13.]

[* 247. a.]

22. H. 6. 10. b. Litt.

13. Perk. 227.

[Co. Lit. 50. a. Shep. Touch. 208.]

South-Mymmes aforesaid by the name of one capital messuage called *Barkes* in *North-Mymmes* in the county of *Hertford*; and of all those lands, tenements, meadows, pastures; and other his hereditaments which were heretofore demised, occupied, or went with the aforesaid capital messuage called *B.* and which were lately in the tenure or occupation of *J. P.* or his assigns; and concluded with an *issint eins sans tort*, and an averment that the tenements in the plaint were demised, occupied, or went with the said capital messuage, and lately in the tenure and occupation of the said *J. P.* or his assigns &c. (72) And upon this plea the plaintiffs demurred in law. And it was moved, that the plea is not good without giving colour to the plaintiff through *Fortescue*, because it acknowledges no reversion in the plaintiff, wherefore &c. Yet *quere* this, because the plea is no bar to the assize, for he shall not say, *assisa non*, where he does not plead as tenant of the freehold &c. But by the name here it is not well pleaded, for the principal messuage is in a different county from the land in the plaint. Yet all the Justices agreed; that by the lease and contract above for years, the lands in both counties would pass to the lessee: otherwise * would it be of an estate of freehold, where livery of seisin must be made. But the better form of pleading would have been, that one *J. Fortescue* was seised as well of the aforesaid tenements put in view &c. as of one capital messuage called *Barkes* in *North-Mymmes* in the county of *Hertford* in his demesne as of fee, and being so seised thereof demised &c. by the names &c.

Marshall, Administrator of Toft, against Wylkinson:

That by the custom of London a debt due to an intestate was attached in defendant's hands, and paid over in an action against the ordinary after administration granted, is no plea to an action by the administrator for that debt.

See the record of this case, New Entries, tit. Dett, fol. 142. pl. 21.

(73) *WILLIAM TOFT* was indebted to one *Foxcroft* in one hundred pounds, and one *Wylkinson* was indebted to the said *Toft* in twelve pounds nine shillings by bill obligatory. *Toft* died intestate; the ordinary committed administration to one *Marshall*; after which *Foxcroft* prosecuted a plaint of debt in London against the ordinary for his hundred pounds, and upon his suggestion, and default of the ordinary (*nihil habet* being returned), the twelve pounds nine shillings were attached in the hands of *Wylkinson*: and after

(73) *M.* 29, 30. *Eliz. B. R. & Marfb v. Banisford. Per Cur'*, That a debt on record is not attachable. [3. Leon. 240. 3. Cro. 63. And see 4. Term Rep. B. R. 312, 313.]

the fourth default of the ordinary being always returned *non est inventus*, the twelve pounds nine shillings, as so much of the one hundred pounds affirmed to be due by the oath of the plaintiff, were recovered against *Wylkinson*, and paid to *Foxcroft*. And after that, *Marshall* brought an action of debt in *C. B.* as administrator of *Tost* for the twelve pounds nine shillings. And the custom of foreign attachment in *London*, with the matter above, was pleaded in bar; and the plaintiff demurred in law. And because it appeared by the plea above, that no action of debt lies in the case above against the ordinary after administration committed by him; nor for the ordinary against *Wylkinson*, the debtor of the intestate; by any law; and also, as some thought, no action lay against the ordinary for a debt of the intestate before the statute *West. 2. c. 19.* which was made within time of memory, which can never make a custom &c. the plaintiff shall have judgment to recover notwithstanding the plea of attachment &c.

[3. Will. 298.]

See Dy. 196. b. pl. 42. ante. Dy. 82. b. 1. Ro. Abr. 551.

Plow. 277. Gref. brooke and Fox. Br. Judgment, 74. 21. E. 4. 7. b. 11. H. 4. 73. b. 38. E. 3. 26. 4. Co. 82. 42. E. 3. 2. 9. E. 4. 33. 18. H. 6. 23. b. 11. H. 7. 12. 8. Co. 136. N. B. 120. d. 4. E. 4. 33.

[2. Lev. 157. Godolph. 198.]

Br. Ordinary, 21. See 5. Co. 82. b. 9. Co. 39. 3. Cro. 410. 2. Inst. 397. contra

1. Inst. 113. a.

[1. Com. Dig. 257; 259. but see 2. Bac. Ab. 398. 413, 414. and 2. B. Com. 495. Priv. Lond. 263. 266. Laws of Lond. 116, 117.]

The Case of New College, Oxford.

(74) THE warden, three bursars, five deans, and five senior fellows of *New College in Oxford*, by the private statutes of that house have authority given them to dispense with the absence of any fellow beyond the space of two months, to the observation of which they are all sworn. If the major part of them grant and assent to such a dispensation, and the residue deny it, it is thought by the opinion of the two CHIEF JUSTICES, the CHIEF BARON, Justices WHYNDON, BROWN; and WESTON, that it is not good, because it is out of the case of the statute 33. H. 8. c. 27. which extends to grants of leases, grants, and elections of the major part of the whole number of a corporation, and not to any particular number of the corporation, as is the case here.

Where a private statute of a college empowers certain members thereof to dispense with the absence of a fellow; dispensation by the major part only of those individuals is not sufficient.

21. E. 4. 14.

15. E. 4. 2. a.

Coke, 4. 77. b.

[See Bac. Ab. Authority, C. 2. Atk. 112. Str. 53. 3. Bur. 1827. Cowp. 248. 250. 538. 5. Bur. 2598. 4. Term Rep. 810.]

* [247. b.]

Spyrtie against Rede.

(75) NOTE, On the very effoign day of the quinqueme of *Hilary* in this Term, in the grand assize in the writ of right *quia dominus remisit curiam &c.* by *Spyrtie* against

On the mife joined in a writ of right, the tenant shall begin with his evidence first.

(75) The antiquity of this trial. See *Glanvil Lib. 2. fol. 72, 73.* and *Mich. g. Job. Rot. i. dorf. 13.* and in the receipt of the exchequer the four errors were amerced. And so it appears

Mo. 67. [Dal. 68.]
22. E. 3. 13.
Dy. 98. pl. 52.

[1. Leon. 303. Booth
Real Action, 97.]

[Vin. Ab. Evidence, 3.
a. and Booth Real Ac-
tion, 98.]

NEUBURGH
v.

THORNBULL.

against *Rede*, the Jury with the four Knights elisors appeared, and were charged to try the right, and the mise joined upon the grand assize, who were sixteen in number with the four elisors; and there an oath was administered and pre-rehearsed to them by the prothonotary, expressly to say the truth &c. and by the order of the Court, the tenant by his counsel shall produce his evidence first, because the mise is joined, and prayed by him first. And the verdict was given for the tenant. And the same order was observed in a like writ between *Neuburgh* and *Thornbull*, in the county of *Dorset*, *Easter*, 11. of the present Queen, and the verdict passed against the demandant also.

appears 15. *H. 3.* at the close of the leaf 18. Yet in a case of necessity it was good without knights; and Serjeants, and others, may supply [their places], as appears 33. *E. 1.* F. Trial, 97. and Litt. 294.

T. 28. *Eliz.* between *Haydon*, demandant, and *Igrave*, tenant [1. And. 248. 3. Leon. 162.] it was observed accordingly by the Court for land in the county of *Hertford*.

Where land is given to *A.* and to the heirs of the body of his father, in a formedon in descender brought by the son of *A.* he must entitle himself as cousin and heir to his grandfather; for it may be that *A.* was a younger son.

Littl. 30. accord. 17.
E. 3. Tayle, 27. 2.
E. 3. 1. 1. Co. Shelle's
case. 5. Mar. 156. b.
12. H. 4. 3. a. Dy. 276.
pl. 56. 4. 2. E. 37. 28.

[Of counting in forme-
don in descender see
Vin. Ab. Formedon, H.
Com. Dig. Pleader,
3 E. 2. and Booth Real
Act. 143. 145.]

(76) GREAT-GRAND-FATHER, grand-father, father, and son. The great-grand-father died, and afterwards the land is given to the grand-father, and to the heirs of the body of the great-grand-father, issuing. And in a formedon in descender brought by the son the writ supposes, "*et quæ post mortem* of the aforesaid grand-father, and the father the son and heir of the said grand-father, ought to descend upon the aforesaid son, as son and heir to the father *per formam donationis prædictæ*," and does not make himself cousin and heir of the body of the great-grand-father, nor the father, cousin and heir to the great-grand-father, which would have better accorded with the limitation and form of the gift aforesaid: and so some thought that the *quæ post mortem* might have been thus, *s. et quæ post mortem* of the great-grand-father, and of the grand-father, son and heir of the great grand-father, and of the father, son and heir of the grand-father, to the aforesaid demandant, son and heir of the said father, ought to descend &c. although the great-grand-father never had anything in the entail; and each of these two forms would have been more certain and sure—by

(76) It seems that if land be given to the younger son, and to the heirs of the body of the father begotten, the father being dead at the time, that now the eldest shall take as joint-purchaser by *ϕ 3. E. 3. 28.* where land is given to *I. &* and to his eldest son. *ϕ 18. E. 3. 59.* [Co. Lit. 3. b. 3. Leon. 14.]

CATLYN, DYER, and SAUNDERS, because it might be intended that the grand-father, in whom the gift first vested, was a younger son of the said great-grand-father. But BROWNE and WESTON held the above form to be good enough, and that no man ought to intend that, without it was shewn by the tenant in fact. See a like case *M. & 15. El.* fol.

(77) A LESSEE for term of years grants all his estate and term over to another, and notwithstanding this, the lessor brought an action of debt against the lessee for rent arrear after the grant and assignment over. And it was moved Whether the action lies, or not. And several of the Justices, and CATLYN, were of opinion that the action does not lie, for the privity between the lessor and lessee is gone and determined by the assignment of the entire * term, and a new privity is made, which goes with the land, between the lessor and the assignee. Yet *quære* whether the privity of contract does not remain between the parties to the first contract, because it is personal &c. And see 44. *Lib. Aff.* 18. [23.] in the title of *Challenge*, 49. *accord*. (*ut credo*) [It is *Fitz. Ab. tit. Challenge*, 104.] As where there is lord and tenant, and the tenant alienes, still he remains tenant as to the avowry for rent accruing afterwards until the alienee becomes tenant to the lord.

Debt will not lie against the original lessee for rent accruing after the assignment of his term.

9. H. 6. 52. 3. Co. 22. a. it well lies. 10. H. 6. 11. b. 14. H. 7. 5. a. 24. H. 8. 4. b. 5. H. 7. 18. Dy. 254. 1. 14. H. 7. 4. a. 9. H. 6. 52. b. 20. H. 6. 9. b. 8. H. 7. 10. B. N. C. 108.

* [248. a.]

44. E. 3. 5. a. 8. a. Perk. 131. 4. 22. H. 6. 20. 34. b. 2. E. 4. 6. 7. E. 4. 28. a. 8. E. 4. 12. b. 48. E. 3. 9. Mo. 600. Went. 171. [2. Com. Dig. 641, 642. Bul. Ni. Pr. 159. Dougl. 91, 92. 183. 187, note (59). 461. 455. 764. 1. Hen. Bl. 437. &c. 3. Term Rep. 402. and Bac. Ab. Debt (D.)]

Dame Dennis' Case.

(78) IT was concluded and granted by indenture made in the 36th year of Henry 8. between Sir Maurice Dennis, Knight, and Elizabeth Statham, widow, as well in consideration of a marriage to be had between them as for other good and reasonable considerations, that the said Sir Maurice and his heirs amongst other things should stand seised of and in divers lands (which he had in fee-simple in London &c.) to the use of himself and of his heirs until the

Grant in fee by A. to himself and his wife on their marriage, may be averred to have been for jointure, and shall bar dower by the equity of 27. H. 8. c. 10. But estates in fee are not within 11. H. 7. c. 20. [14. Vin. 549.]

Co. Lit. 326. b. 4. Co. 3. b.

M. 38. 39. Eliz. C. B. in Laugbter and Humphries' case [Cro. Eliz. 524.] It was agreed by the Court that an estate in fee made by the husband to the wife is no jointure under 11. H. 7. because any collateral heir may inherit it, and the statute was made for the benefit of issue between them.

11. El. 266. 17. Eliz.
340 b.

B. N. C. 317. 422. 441.
14. El. 317. b.

[Com. Dig. Dower (E).]

16. Jac. Cro. 474.

[3. Com. Dig. 71. a.
Bac. Ab. 93. in notis.]

1. Mar. 96. a.

Dy. 208. 228.

Dy. 61. b.

Co. Lit. 326. b. 365. b.

6. El. 230. a.

4. Co. 4. a.

[1. Br. Ch. Caf. 292.

2. Bac. Ab. 141. Co.

Lit. 36. b. Mr. Har-

grave's note (6).]

marriage was had and solemnized between them, and after the marriage had, then to the use and behoof of the said *Maurice* and *Elizabeth*, and of their heirs. And afterwards the marriage took effect accordingly. And afterwards *Sir Maurice* died, and she survived, and entered into the said lands, and demanded dower also of the residue of his lands. And Whether this conveyance, and the matter above (with an averment that it was for a jointure) ought to be a bar of her dower, was the question. And it seemed to *CATLYN*, *SAUNDERS*, and *DYER*, that it should be a bar by the equity of the statute of 27. H. 8. c. 10. and by the words of the third proviso, which speaks of jointure *for term of life, or otherwise*. But *BROWNE* and *WHYDDON* *à contra*, and that the statute of 11. H. 7. c. 20. cannot be intended of a fee-simple, but only for life or in tail, jointly or severally with the husband. But see 6. R. 2. c. 6. in the statute of rape, which speaks of *dower* † or *joint-feeffment* &c. Yet *Brooke* reports in *Dower*, c. 69. the opinion of the Justices, 6. E. 6. to be with *BROWNE* and *WHYDDON*. And so of a devise by will to a wife, *s.* that it is not a jointure, but a benevolence.

† Orig. en.

A steward to hold courts with a salary may be appointed by parol: and debt, though not a writ of annuity, will lie for such salary.

Keilway, 158. b. and

274. b. 20. E. 6. Br.

Court Baron, 22. 1.

Cro. 59. 60. 4. H. 7.

6. 4. Co. 30. a.

[Co. Lit. 61. b. 1.

Leon. 227. Cro. Jac.

326.]

* [248. b.]

(79) IN *B. R.* it was the opinion of *FINEUX*, *BRUDENELL*, and *CONESBY*, *Justices*, that a man may retain another to be his steward of his courts for a time, † *at* for a year or more, and that he shall have so much for his labor, and all this without any deed; and if he hold his courts according to the retainer, he shall have an action of debt, for his salary against the lord: but he shall not have a writ of annuity without a writing of his office. And one may be retained to be * a steward as well as to be bailiff or servant without writing. *Quod nota.*

† Orig. ou.

Whether case for diverting *multum aque* of a stream *qui currere consuevit* to a mill is good

(80) ONE who had freehold † *in* a water-mill, brought an action on the case against one who had freehold in a meadow, through which the water that ran to the mill did

† Orig. ou.

pals; and supposed by the writ that the defendant much diverted the course of the water by the erecting and constructing a weir or dam across the current of that water, and by a ditch made in the said field, whereby much of the water which had been accustomed to run to his mill returned a contrary way, and diverted its ancient course, so that the mill which used to grind two quarters of wheat a-day could now scarcely grind one &c. to the damage &c. And Whether assize of nuisance lies, supposing that the defendant diverted the course of the water, where only part of the water is turned or not, was the question. A similar case, *post*, fol. [319. b. pl. 17.] and see *M.* 12. and 13. of the present Queen, *Rot.* 1168. [*Co. Ent.* 92.] Assize of nuisance for the diversion of the major part of the course of the water by *Wyke* against *Serle*, and he recovered by judgment before *WESTON* and *HARPER*; whereupon error was brought in *B. R.*

by one who has freehold in it; and whether assize of nuisance lies for such diversion.

1. Leon. 273. 2. H. 4.
11. 33. H. 6. 26. 48.
E. 3. 27. 28. E. 3. 27.
3. 16. 48. Aff. 19. 3.
4. Dy. 195. 250. b.
20. H. 7. 9. 2. Ro. Ab.
143. Br. Action sur le
Cafe, 71. Br. Nuisans.
3. 1. Bull. 47. F. N.
B. 103. mesme, 92.
22. H. 6. 14. 11. Jac.
Cro. 324. 14. H. 8.
31. b. 21. H. 7. 30. a.
32. Aff. 2. 21. Aff. 1.
14. H. 8. 3. 3. Cro.
199.
[See 4. Co. 89. 3. Mod.
49. 51. Skin. 389. F.
N. B. 429. note (a).
1. Com. Dig. 215. 3.
Bl. Com. 218. 222.]

Easter Term, 8. Queen Elizabeth.

Basset's Case,

(81) IT was found by an inquisition taken by virtue of a commission in the nature of a *diem clausit extremum* after the death of *W. Basset, Esquire*, that the manor of *Chedul* in the county aforesaid was holden of the Queen in socage as of the barony of *Stafford*: and afterwards, by another commission, directed to divers persons whereof some on the first commission were commissioners, the tenure of the said manor was found to be of the Queen as of the said barony by knight-service. And afterwards a third commission reciting the two former inquests was awarded, which began, "It is already found for us by a certain inquisition taken at *B.* in the county aforesaid on the 6th day of September, in the 6th year of *H.* 5. that *Richard Lord Grey de Codnor*, in right of his wife then living, held of the said late King on the day of his death *in capite* by knight-

Where three inquisitions *post mortem* were taken, each varying from the former in its return as to the tenure, holden, that the heir needs not traverse the two last, as the first must be allowed, though against the queen's interest, until disproved by *scire facias*.

Dy. 162. a. 292. a. 8.
Co. 169. Br. Office de-
vapt, &c. 33. Br. Of-
fice, 44.
3. H. 7. 2.

" knight-service the third part of the manor of C. in the
 " county aforesaid," with another clause in the said third
 commission, s. " Further it is given us to understand that
 " the said W. Bassett held, on the day of his death, divers
 " other lands and tenements in the county aforesaid &c."
 Upon which third commission was found by inquest after
 this manner, s. " who say on their oaths, that upon better
 " inquiry the tenure of the said third part was of the Queen
 " in capite by knight service, as by the said inquisition of
 " the time of H. 5. more fully may appear." And they
 found also that Bassett died seised of many lands &c. And
 note, that an *amoveas manum* was sued out by the said wife of
 Lord Gray upon the said office found in the time of H. 5.
 And this appeared also of record. The question now is,
 Whether the heir be driven to traverse the office found for
 the Queen as above, or not. (82) And by the opinion of
 the counsel and assistants of the Court, s. NOWELL, KAYLE-
 WAY, SAUNPERS, Chief Baron, and DYER, Chief Justice
 of the Bench, he shall not be driven to traverse either of the
 two last offices, because they are without warrant. And the
 first office, although it is against the Queen, ought to be
 allowed until it be disproved by *scire facias* sued out of the
 chancery returnable into the Queen's Bench, which shall be
 granted upon this record in the time of H. 5. according to
 the statute 29. E. 1. called statute *de eschaetribus*, made at
 Lincoln. See the case above, of a *melius inquirendum* in
 4. H. 7. [15. b.] and 14. E. 4. [4. b. pl. 4.] and M. 4.
 5. E. 6. in the court of wards, for *Miffey*.

* [249. a.]

Dy. 168.

8. Co. 169.

2. Inst. 572.
 2. H. 7. 18. a.
 7. Co. 44.
 Stamf. 52. Dy. 292,
 2. E. 6. c. 8.
 Br. Office, 33, 34.

[See Co. Lit. 77. b.
 3. Bl. Com. 258. 2.
 Bl. Com. 68. and 12.
 Car. 2. c. 24.]

Brereton's Case.

By a general pardon, discharging all intrusions and entries, the mean issues of *capite* lands in lease on rents, and suing of liveries that have not been tendered, are discharged, and the exception of homages, reliefs, rents, &c. with the actions of accounts and debt reserved therein to the king, does not apply to these rents, which he was not entitled to by

(83) **THOMAS BRERETON** was seised of the manor of *Wettenhale* in *Cheshire*, holden of King *Ed. 6.* in *capite*, being in lease for years to several tenants by several rents; and so being seised thereof died seised in the 2d year of *Ed. 6.* after whose death his heir (without tendering any livery) entered into it; and until this day hath taken the issues and profits thereof to his own use, no office yet found. And the heir being called in the Court of Wards &c. to know what he had to say why an office should not be found, and livery sued, alleged the general pardon granted in the 5th

year

year of Queen *Eliz.* [c. 31.] and Whether there are any words in the pardon sufficient to discharge him of the intrusion, and the mean issues, and suing of livery, *quere.* And yet it was resolved by the counsel and assistants of this court, that the pardon discharges all entries and intrusions, and consequently all mean issues and suing of livery: but if he had once tendered his livery, then by the proviso he ought to have sued it out; and so it is to be expounded as a copulative, and not as a disjunctive &c. A like precedent of a pardon was shewn by *Manwaring*, in the time of Queen *Mary*, s. in *Easter Term*, 4th year, in the Court of Wards; and this by the opinion of PORTMAN and BROOKE, being *Chief Justices* of either Bench, BROOKE, *Chief Baron* of the Exchequer, SAUNDERS, *Justice*, BAKER and CATLYN, *Queen's Serjeants*, for the discharge of issues, profits, and rents of certain manors in the county of *Cheeshire* received and perceived by the said *Manwaring* after the death of his father, of which, and of the intrusion, an office was found after the three pardons which were pleaded, s. the general pardon of 21. * *H. 8.* [c. 1.] and 26. *H. 8.* [c. 18.] and 2. *E. 6.* [c. 39.] But it did not appear that any of the lands were in lease for years, as is the case of *Brereton* above. And BROMELEY and WRAY thought that the Queen might have an action of account against *Brereton* as her bailiff or receiver, and likewise an action of debt against the lessees, who are both excepted out of the pardon. And KAYLEWAY thought that the rents are saved by the exception of all homages, reliefs, rents, and services, &c. which is not true, for the Queen was not then entitled to any action or rent by law. But at length it was agreed as is above resolved.

law at the passing of the statute.

Jenk. Cent. 6. c. 9. S.C.
Dy. 193. 285. 36. 286
42. 2. Ro. Ab. 178.

13. Jac. Cro. 390.
1. Keb. 818.

Dy. 360.

3. H. 7. 3. 16. E. 4. 1.
Stamf. 40.
Dy. 196. 2.

33. H. 8. B. N. C. 204.

* [249. b.]

8. Co. 152. a. Litt. 27.
11. Co. 90. Dy. 238.

[By 12. Car. 2. c. 24.
this tenure and all its
consequences are abo-
lished.]

Worlay against Harrison.

(84) *MEMORANDUM*, That one *Harrison* was imprisoned in the comptor of *London* upon a statute staple at the suit of *Worlay*, and because the prison was hard and strait he devised a shift to be removed thence to the Fleet, which was a more easy and roomy confinement: and his scheme was thus: he made a bill obligatory for twenty pounds to one *Sotherne* an honest merchant of *London*, and

East. S. El. C. B. Rot. 109.

One in the comptor to change his prison procured a feigned action and judgment against him in C. B. and was committed in execution to the Fleet, but on discovery of the fraud the Court set a fine on him, and remanded him back to the comptor.

[Co. Ent. 344. b. S. C.]
 1. Ro. Ab. 807. 2. Inf.
 215. 3. Co. 73. b. 16. E.
 4. 5. Dy. 231. b. 232. b.
 245. Kelw. 70. 39. H. 6.
 50. Noy. 38. 58.

caused the bill to be put in suit against himself in the name of the said *Sotherne*, and thereupon was condemned on a *cognovit actionem*. And afterwards he procured an *habeas corpus cum causa* to the sheriffs of *London* out of the Bench, and thereupon was carried into the Bench with his cause; and there one in the name of *Sotherne* prayed that he might be committed to the Fleet in execution upon this condemnation; and the Court not knowing of this subtle and false practice committed him to the Fleet under both executions, And afterwards this matter was disclosed to the Court by *Worlay*, and acknowledged by the party himself, and *Sotherne* there in court entirely disclaimed the debt and suit, wherefore it was prayed by *Worlay*, that *Harrison* might be remanded to the compters: and Whether he should have his prayer or not, was well argued, because at one period of time the sheriffs of *London* were discharged of their prisoner by the Court &c. Yet by the opinions of all the Judges he shall be remanded to the compters, and a fine assessed for the fraud and deceit at ten pounds, and also a *vacate* made of the record. See well the statute 1. R. 2. c. 12. for this matter of imprisonment in execution, and how a prison and prisoner shall be ordered: and also a decree and order made in the star-chamber, T. 24. H. 8. by the advice of FITZ-JAMES and NORWICH Chief Justices of the Benches, FITZ. and SPYLMAN Justices, that by law such prisoner shall not go at large within the prison, nor out of the prison with the warden, but shall be kept straitly in custody &c. And an injunction thereupon given to the wardens of the prisons throughout all *London* to observe the said order and decree under pain of one hundred pounds.

[2. H. H. P. C. 145. and
 see ante 245. b.]

39. Aff. 9. Raft. Det. 4.
 307. Dy. 244. b. 331.

[Ante, 157. 2. pl. 6.]

Flow. 36. b. 2. Inf. 381.
 27. Aff. 44. 7. H. 4. 64.

1. Ro. Ab. 806. 7.

3. Co. 44. 2. 78. a. Inf. 35.

* [250. a.]

Trin. 8. Eliz. Rot. 286.

Error on a judgment in
 assise does not lie before
 the Justices of C. B.

1. And. 12.
 Mo. 78. } S. C.
 An. Ben. 40.
 [Bendl. 153.]

Dy. 77. 4.

* Ap-Richarde and others against Jones, in Error

(85) *ITEM*, Hil. 10. Queen Eliz. Rot. Error brought by Ap-Richarde and others against Jones upon a judgment in assise before SAUNDERS Chief Baron and CARUS Justices of Assise in the county of *Monmouth*: and the writ was *quæ coram vobis resident*, directed to the Justices of the Bench, and divers errors assigned: and the defendant

(85) The writ speaks of the record *quod coram vobis resident*, and this record was first removed by *certiorari*, and not by *mittimus*. Bendlöf, fol. 122. [153. pl. 213.]

would

would not answer to the errors, but demurred in law upon the insufficiency of the writ of error, and of the writ of *certiorari* by which the record was removed into the Bench, and also to the jurisdiction of the Court to hold plea of a writ of error upon a judgment in assise before Justices appointed by the Queen's letters patent. See *Fitzherbert Tit. Assise*, 396, and in the 8th year of E. 2. in the *Iter of Kent*, assise was arraigned in *Kent* before RATLYFE and SPIGURNEL, and the parties pleaded to the assise: and afterwards the assise was taken before the King himself, s. in *B. R.* sitting in the same county as it seems, and found for the plaintiff by a false verdict, and judgment thereupon given; upon which the tenant brought an attain in *C. B.* and the record of the assise sent there by the King with a command to proceed in the attain; and notwithstanding an exception to the jurisdiction of the inferior Court, they took the attain, who found the false verdict, and judgment was given accordingly against the petit jury &c. And note, that the grand jury were questioned of the view of the land, because the plaintiff had recovered by the view of the jurors in the assise: and *Fitzherbert* in the treatise of attain in his *Natura Brevium*, 107. N. has noted this case as above. And in *M.* 35. H. 6. [29. pl. 34.] Rot. 579. *Norff.* attain between *Ingham* plaintiff and *Denis*, upon the tenor of a record and process of appeal of *mayhem*, was brought in *C. B.* upon a verdict given in *B. R.* in the said appeal, and the tenor sent by the king's writ into the Bench out of Chancery. And another attain brought in *C. B.* by *Austin* against *Baker* upon a verdict given in the Exchequer, and the record sent out of the Exchequer immediately into the Bench by writ of *certiorari* out of Chancery, T. 3. of the present Queen, Rot. 821. [*ante*, 201. pl. 65.] (86) And note by *Fitzherbert* in his treatise in *Natura Brevium* upon a writ of error, in three several places [20. D. 21, G. 24. E.] that if an erroneous judgment be given in any court of record, except the two Benches, the party grieved at his pleasure may sue a writ of error returnable into the Common Bench or *B. R.* And if erroneous judg-

L. 5to. E. 4. 58. a. 24,
c. 3. Error, 6.

5. H. 5. 1. b. Dy. 364. b.
3. Cro. 371.
[Cowp. 843. Salk. 321.]

3. H. 4. 16,
Dy. 235.

7. E. 6. 81. b. Dy. 275.

[Of the removal of records generally, see Bac. Ab. Error, (D.) (E.) Com. Dig. Pleader, 3 B. 13. Cowp. 843. & Dougl. 352. note.]
3. Cro. 26. contra.
[and 2. Crom. Prac. 343.
3. Bl. Com. 410 *.]

Dy. 268. 320, 321.

(86) It was agreed in the chancery that there is no *certiorari* in the *Register* to remove a record out of a court into *C. B.* immediately, but it shall be certified in the chancery by surmise, and then is to be sent into *C. B.* by *mittimus*; and indictments may be removed out of the country by *certiorari* to the chancery and afterwards sent to the Justices of *B. R.* by *mittimus*; and then they proceed upon it. 36. H. 6. Br. *Certiorari*, 20. & 44. E. 3. 20. Note, fol. 32. *ante*.

[4. Inst. 218.]

21. H. 7. 37. Br. Judgment 18. 4. H. 6. 23. Dy. 254.

* [250. b.]

19. H. 6. 52.

Br. Record, 82. 84. 30.
34. 36. H. 6. 6. b. 42. b.
33. b. Dy. 187.

Br. Adjournment, 15.

5. Aff. 4.

2. Inst. 551. 9. Co. 31.

9. H. 6. 9. b. Br. Tryal,
64. 30. E. 3. 22. 8. 22.
Aff. 35. 45. 40. E. 3. 23.
21. E. 3. Cause de Re-
mover Plea 16.
Br. Failer de Record, 3.

2. E. 3. 15. b.

Finch. fol. 111.
F. Nat. 21. I. contra.

[and Rol. Ab. 745. pl. 15.
but see 1. Leon. 55. 3.
Leon. 159. Cro. El. 26.
2. Crompt. Pract. 343.
3. Bl. Com. 410 *.]

ment be given before the Justices of the Bishop of *Durham* within the county palatine, the party grieved shall have a writ of error there before the Bishop himself. *M. 14. E. 3.* [*Fitz. Ab. Tit. Error 6.*] and if he give erroneous judgment the writ of error may be sued in *C. B.* or *B. R.* but see well this case of 14. and *quære.* And *Easf. + 4. H. 5. 8.* whether the Court of *C. B.* may write to the Justices of Peace to certify the record of a judgment * of felony upon *nul tiel record* pleaded in a writ of conspiracy brought in the Bench. And also 19. *H. 6.* fol. 19. Also *quære 13. H. 7.* [21. b. pl. 7.] in debt brought in the Bench for damage recovered in assise in the country, and defendant pleaded *nul tiel recovery*, whether the Court can write to the Justices of Assise to certify &c. because the Justices of each Bench doubted thereof: and in the interim the record came by *certiorari* and *mittimus* under the great seal out of chancery. But in 16. *H. 7.* [11. b. pl. 5.] it is holden in assise, that if an assise be adjourned into the Bench for difficulty in framing the verdict, the Justices of the Bench may proceed to judgment there; but if it were before verdict it would be otherwise, because the assise is to be taken in the proper county. And so it would be done upon a foreign plea tried in the Bench, if the plaintiff would release the damage where an ouster was confessed, and pray judgment in banc, he shall have it without remanding the assise &c. 8. *Lib. Aff. 8.* [15.] and this by *Magn. Chart.* c. 12. And see the statute *de articulis super chartas* passed 28. *E. 1.* c. 3, 4. to exclude the jurisdiction in common pleas of the Marthalsea and the Exchequer against the form of *Magna Charta* &c. (87) See a precedent, *M. 3. H. 8.* in the Bench, Rot. 341. where issue was joined in a writ of entry upon *disseisin in the post*, whether the manor of *Sudbury* in the county of *Suffolk* was ancient demesne or not, it was told by the Court to the tenant who pleaded ancient demesne, that he should have the record of *Domesday* book at a certain day at his peril &c. at which day the record was sent into the Bench by *mittimus* out of Chancery, with the *certiorari* which issued out of the Chancery and directed to the Treasurer and Chamberlain of the Exchequer &c. by which record it was found ancient demesne, whereupon judgment was given, that the tenant go without day, and that the demandant should sue in ancient demesne if &c. And the opinions of all the Justices of *C. B.* in the 10th year of the present

sent Queen was against the writ of error being brought in the common bench for the erroneous judgment in assise &c. See *Britton*, lib. 1. c. 1.

Yevance against Holcomb.

(88) **A**N action upon the case was brought for stopping up a way over the defendant's land, s. from the house of the plaintiff to a park, and from the park to the house back again at all times of the year, and for all carriages, by prescription. And it appeared that the plaintiff had a lease for the term of his life in the house, but not in the park as his lessor had. And the prescription was traversed, and found for the plaintiff by verdict, and in arrest of judgment it was said, that the plaintiff ought to have assise of nuisance, and not this action: and so was the opinion of the Court.

Mich. Ut. Rot. 1552.

Case does not lie by one who has freehold in a house for obstructing his way to it over defendant's land, but he must have assise of nuisance.

4. Leon. 167. 224. }
3. Leon. 13. Co. } S.C.
Ent. Tit. Action }
sur le case, 11. }
and 12. }

Noy. 37. pl. 148. 11. H.
4.8. 3. a. 3. Cro. 245. 1.
Ro. Ab. 104. 2. Ro. Ab.
138. 5. 9. Co. 101. 112.
2. H. 4. 11. Fitz. 185. a.
183. 184. 19. H. 6. 29.
7. H. 4. 11. 14. H. 8. 31. b.
4. Co. 86. 33. H. 6. 26. a.
22. H. 6. 15. a. 21. H. 7.
30. a. & 12. 3. Cro. 845.
contra. 2. Leon. 184.
[Vide ante, 248. b.
pl. 80.]

(88) *East. 28. Eliz. & B. Aston's Case.* Plaintiff had a way over the defendant's land, and defendant made a trench, and stopped up all the way, and agreed, that action on the case lies, although he might have assise, *PER TOTAM CURIAM*, and they said, that this case is not law, and judgment was given for the plaintiff in an action on the case.

Action on the case by *Fillet* against *Parkhurst*, supposing that he entirely obstructed the way over the land of the defendant whereof he was seised, which was appendant to a messuage, whereof the plaintiff was seised in fee; and notwithstanding it was alleged, that nuisance ought to be brought in this case, for that the plaintiff and defendant were tenants of the freehold, as the books are, yet according to many precedents shewn by the clerks, judgment was given that this action well lies, for it is at the election of the plaintiff to have either the one or the other, *M. 28, 29. Eliz. B. R.* and according to this judgment is the law clearly taken to be at this day.

M. 8. Jac. B. R. & Pollard and Calies' Case adjudged *contra*, and this case denied to be law. Br. Action sur le case, 12. 64. *Nota*, pl. 29. the opinion of THIRNING.

* [251. a.]

* (89) **A** MAN seised in fee of a manor holden of the Queen in socage and fee farm rent, married, and made his last will in writing, and thereby gave authority and power to certain persons to make leases according to the custom of the manor to raise fines to pay his debts, and died: these persons hold a court in their own names, and there grant a reversion belonging to two men who were copyholders to three others, whereas the custom is, that the land was used to be leased by the lord of the manor, or his overseer, or his deputy &c. And afterwards the wife of the deviser

The custom of a manor was for the lord, or his overseer, or his deputy to make leases; the lord by will empowered two to make leases according to the custom: they hold a court in their own names and grant a reversion: the wife of the lord, it being assigned for her dower, may avoid this grant.

9. Co. 77. Co. Lit. 58. b.

recovered

4. Co. 24. a. Dy. 132.
270. 342. 1. Ro. Ab. 684.
3. Co. 63. b.

[Compl. Copyh. 168.
See Cowp. 481.]

recovered the third part of the manor in dower, and by the sheriff had the said copyhold assigned with other lands by writ &c. Whether she shall avoid the grant made by the said persons assigned by the will, was demurred in law, and holden by the opinion of the Court, that she well may.

Hil. Ult. Rot. 1691.

Hauchet's Case.

A surrenders copyhold to the intent that the lord shall grant it to him for life, remainder to his wife till his son's full age, remainder over; and dies before execution. The lord's grant of the remainder after is good, and the wife marrying again and dying before the son's age, the husband and not her administrator shall have the rest of the term, unless a special custom be to the contrary.

1. Ro. Ab. 504. 908.
Vaughan, 185.
[5. Bur. 2786. 1. Term
Rep. 601.]

12. H. 7. 23. a. 18. E. 4.
11. b. 4. H. 6. 31. b. 1.
Ro. Ab. 345. 846. 4. Co.
51. 10. H. 6. 11. Plow.
192. 294. Dr. & Stud.
13. N. B. 142. B. Gard.
6. 30 E. 3. 6. Count de
Garr. 6. 33. H. 6. 55. Br.
Forfeit, 70. Plow. 294. a.

[Com. Dig. Baron and
Feme (E. 2.) 1. Bur.
209. 214. 217.]

(90) A COPYHOLDER in fee simple according to the custom, surrendered to the lord, to the intent that the lord should grant it back again to him for term of his life, remainder to his wife, until his eldest son shall arrive at his full age of twenty-one years, and after this term ended, remainder to the said son in tail, remainder to the said wife for the term of her life, remainder over &c. And before the execution of the estates, the husband died, the son being of the age of five years, the lord at his court granted the land to the wife until the son should come to his full age, and over as above: afterwards the wife married and died intestate, the husband kept himself in; and one (to whom the administration of the goods of the wife was committed by the ordinary, to whom also the lord had granted the land during the nonage of the son) entered upon the husband, and Whether the entry was lawful, was the doubt. And by the opinion of the whole Court, the entry is not lawful, but the interest which was in the wife was a term, which by the death of the wife vested in the husband by the law and custom of the realm, if any private custom of the manor be not pleaded to the contrary: otherwise would it have been, had the wife been only a guardian, or *prochein amy* of this land &c. Wherefore judgment was given for *Hauchet* who was the woman's husband.

Stepkin against Lord Wentworth, in Affise.

Tenant for life cannot release to him in remainder, but must surrender. [Dal. 32. pl. 17. S. C.]

(91) A LEASE is made for a term of years rendering rent, and afterwards the reversion is granted to one for term of life, remainder over in fee, and the termor at-

(92) And so it was adjudged between *Metcalf* and *Sutton*, 26. Eliz. upon a release of the termor for years to him in the reversion, and that it is nothing worth. [But see 3. Bac. Ab. 457. Bul. Ni. Pr. 110, 111. and the books in *margine*, that it may operate as a surrender.]

torned to the grantee for life accordingly &c. And afterwards the grantee for life by deed releases and quit-claims all his right &c. to him in the remainder, with the common words, "*ita quod ipse nullo modo impofterum vindicare seu clam* tenementum illud potuiffet, et inde effet omnino exclusus imperpetuum &c.*" And afterwards he in remainder reciting all this matter, grants his said remainder and reversion with the rent to one in fee, to whom the termor paid the rent; and likewise the grantee for life released all his right with like words as in the other release, to the grantee and his heirs. It was moved Whether that shall enure as an (a) attornment, or not? And DYER, WESTON, and WELSHE, *Justices*, thought that nothing should pass by this release, nor by the former release, because there are no words of surrender in the deed; and SAUNDERS *Chief Baron* accorded: but CATLYN and WHIDDON *à contra*. But BROWNE afterwards strongly agreed to the first opinion.

2. Co. 67. Lit. 419. Supra, 59 Temps E. 1. Attornment 22. 9. E. 2. Attornment, 18. 18. E. 4. 7. 1. Keb. 807. Bt. Attornment, 7. 7. E. 4. 13. b. Lib. H. Wyndham E. fo. 95. pl. 10. that tenant for life cannot release to him in remainder, Lit. pl. 571. 525. 573-565. Dy. 212. pl. 36. 319. pl. 16. 7. H. 6. 4. b. 8. Co. 94. 2. B. N. C. 473. Post, pl. 93. 1. Ro. Ab. 292. (B.) 1. 303. (G.) 1. Mo. 512. 2. Cro. 169. 3. Cro. 21.

[1. Lev. 145. Shep. Touch. 321, 322. Comp. 599, 600. 3. Bac. Ab. 457.]

(a) By 4th Ann. c. 16. §. 9. Attornment is rendered unnecessary, See Douglass 282.

Winter against Jeringham.

(92) ONE Barnewell seised in fee according to the custom of the manor of Hackney of divers parcels of lands and tenements, was bound by covenant to convey an estate of all his lands and tenements holden of the said manor before a certain day; and before the day he came before Aldred Fitzjames steward of the said manor out of court according to the custom &c. and there surrendered divers parcels of lands, meadows, pasture, &c. some by their proper names, some by abutments &c. specifically &c. according to the covenant. And afterwards at the next court this surrender was enrolled, and the day of the taking of the surrender, and

IN CURIA DE HACKNEY.

A. covenants to assure all his copyhold land, and afterwards surrenders divers parcels by names and abutments, the surrender is enrolled accordingly, but with this addition, "by the name of all his copyhold lands there," yet no more shall pass than were named in the surrender.

Br. Tenant per Copy, 26. 3. Keb. 131. pl. 54. 1. Ro. Ab. 504. 4. Co. 30. 28. 4. Co. 29.

(92) A. seised of land in D. grants it by fine to B. also seised of other land in the same vill of D. [who] grants and renders all his land in D. to A. The land whereof B. was seised passes to A. by YELVERTON, *East*. 40. *Eliz. C. B.* cited to have been so adjudged in 21. *Eliz.* And CREW in the argument of *Dun and Burrell's Case*, *M.* 16. *Jac.* cites this case also to be so adjudged: but note what difference there is between this and the case of *Taverner* cited in the 2d Report, fol. 76. b. And a like case put *verbatim* between *Kellie* and *Dorvilliam*, *Hil.* 38. *Eliz.* [Poph. 104.] on a reference out of chancery to the two Chief Justices and the Chief Baron, and the Master of the Rolls, and by them received, that the land which the conusee himself had in this vill should not pass to supply the small number of acres of which the conuface was made, for this render is as a release to the conusor, and no intent appears to pass the land of the conusee himself. [Cruise on Fine, 66.]

Fait Inrol. 4.

Kitchen, 82.

[Gib. Ten. 238, 239.
Com. Dig. Copyhold.
(G.9.) 1.Bac.Ab.477.]

the particulars *verbatim* as above, with this addition and conclusion at the end, *s. by the name of all the lands, tenements, and hereditaments which he had and held of the aforesaid manor on the day of this surrender &c.* whereas in truth these general words were not in the note of the surrender taken by the steward, as by his letters and other testimonies sufficiently appears. And Whether more land than is particularly mentioned in the said surrender should pass by the said surrender in such form presented and enrolled, or not, was much in debate for the space of 24 years in several courts. And by the opinion of DYER, no more than was particularly expressed in the surrender shall pass; and according thereto, a decree was made by Lord Wentworth lord and chancellor of his manor aforesaid; whereof he afterwards repented. Yet many others agreed with the above opinion as law.

* [252. a.]

Parol agreement without livery by tenant for life, that the reversioner shall have his interest rendering rent is not a surrender.

1.And.33. An.
Ben 24. [Benl. } S.C.
152. pl. 211.]
3. Cro. 488. 2. Ro. Ab.
497. 40.E.3. 24. a. 21.
H.7. 7.a. 44.Aff.3. 40.
Aff.16. 6.Co.26.a. 13.
R.2. Dower,55. 44-45.
E.3.31.b.13.a. Dy.33.b.
Ante, pl.91. Perk.108.
116. 583. Rol. Contin.
474. Br. Surrender, 1.
[1. Term Rep. 441.
Shep. Touch. 302, 303.
5. Com. Dig. 512.]

Brown v. Kingswell.

(93) THE tenant for term of life is content, and agreed with him in reversion, that he shall have the land, and his interest therein for the annual rent of twenty shillings, but no (a) writing or livery of seisin is made of it. This is no surrender, by the opinion of all * the Justices of the Bench; although it was otherwise holden by the Justices of Assise in the county of Surry in an assise; as was said in an attain brought this Term: but the case was rendered more clear by the evidence, for the agreement was, that the tenant for life should have back the land if he survived &c. and then it cannot be intended a surrender.

(a) By 29. Car. 2. c. 3. §. 3. no lease &c. either of freehold or term of years, or any uncertain interest not being copyhold, shall be surrendered unless it be by deed or note

in writing signed by the party surrendering the same or his agent &c. or by act and operation of law. See Gib. Cal. in Eq. 236. 2. Wils. 27.

Vernon against Vernon.

If a *formoden* be returned *tardis*, the tenant cannot be effoined, for he had no day in court: and if the demandant sue an *alias* summons, there

(94) NOTE, If a *formoden* be returned *tardis*, so that the demandant sues out an *alias* summons, there ought to be nine returns between the *teste* and the return, and this by the opinion of the Court and Prothonotaries: and if the tenant

tenant be effoigned at the return of *tardē*, it shall not be adjudged or adjourned, because he had no day in court by this return: and this in a formedon by *Vernon* against *Vernon*: yet *T. 9. E. 4.* [19. a. pl. 20.] is contrary at *nisi prius*, because the *alias* summons is only in the place of an original, and the tenant is not demandable. And note that in the *alias* summons above, there ought to be these words, "*if the demandant shall make you secure to prosecute his claim,*" (except sureties be found *in banc*.) And note that the demandant is within age as they say, *quare inde*.

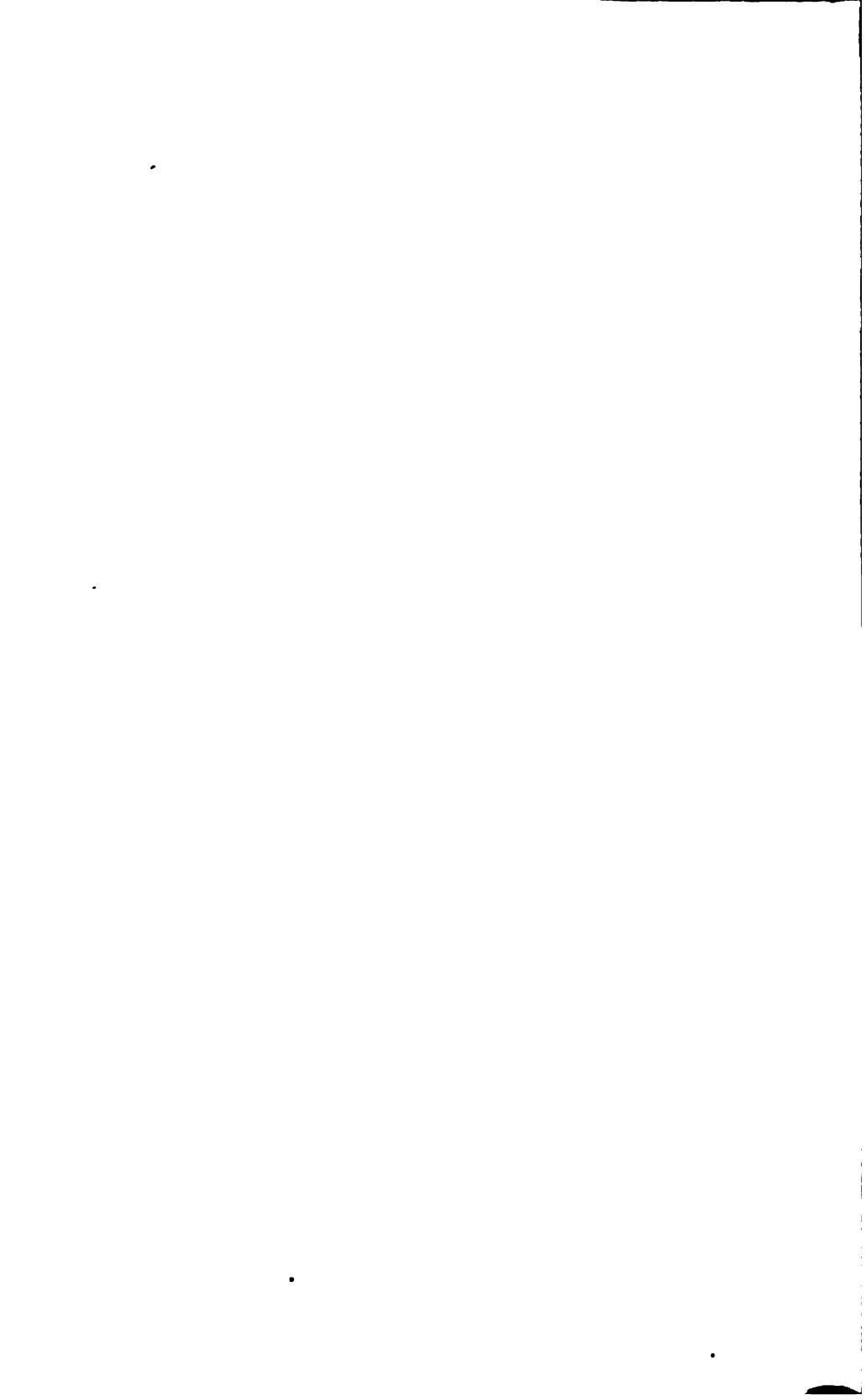
should be nine returns between the *teste* and return. And unless there are sureties *in banc*, the *alias* summons should be *fi feceris te securum*.

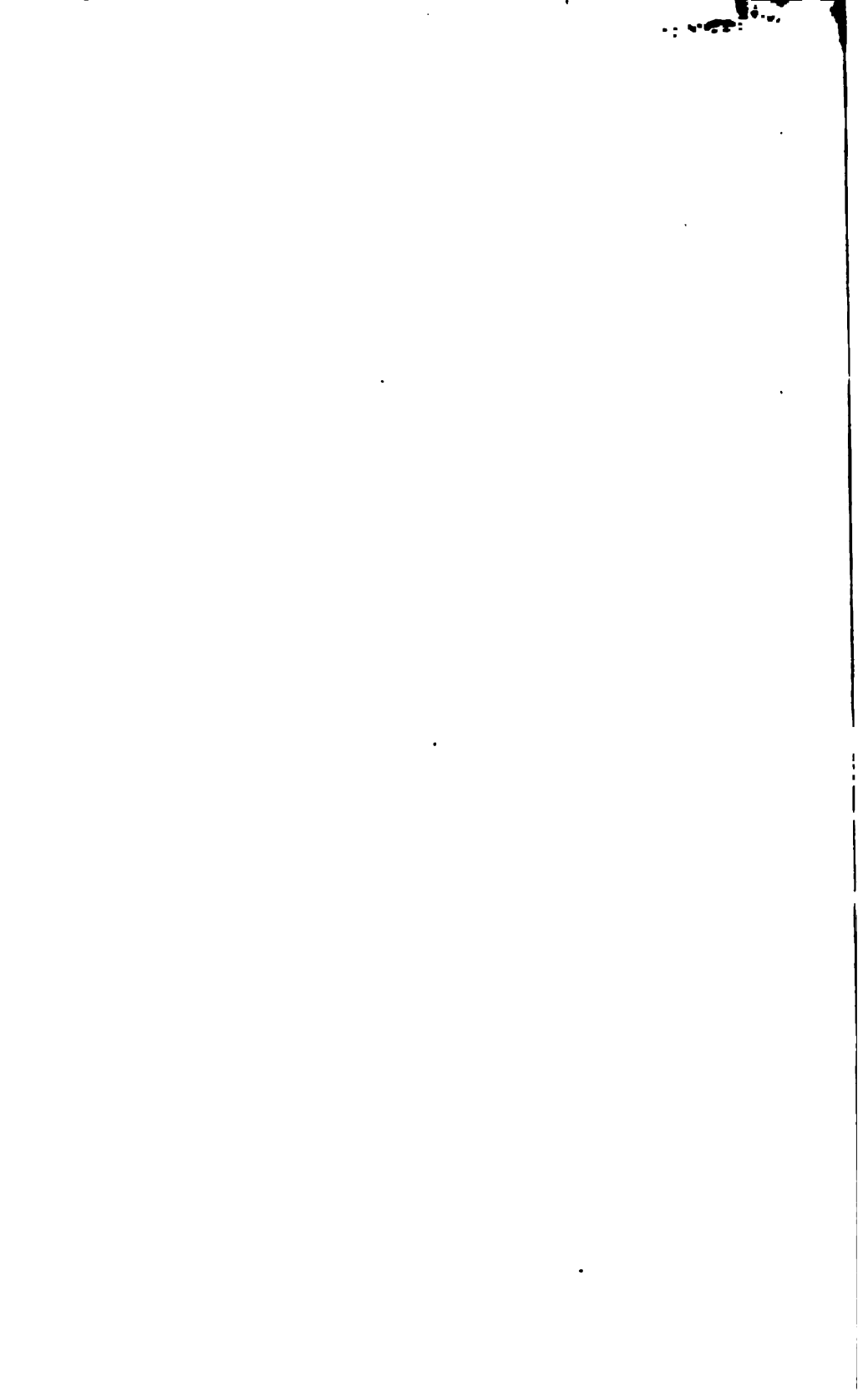
[10. Vin. Ab. 183.]

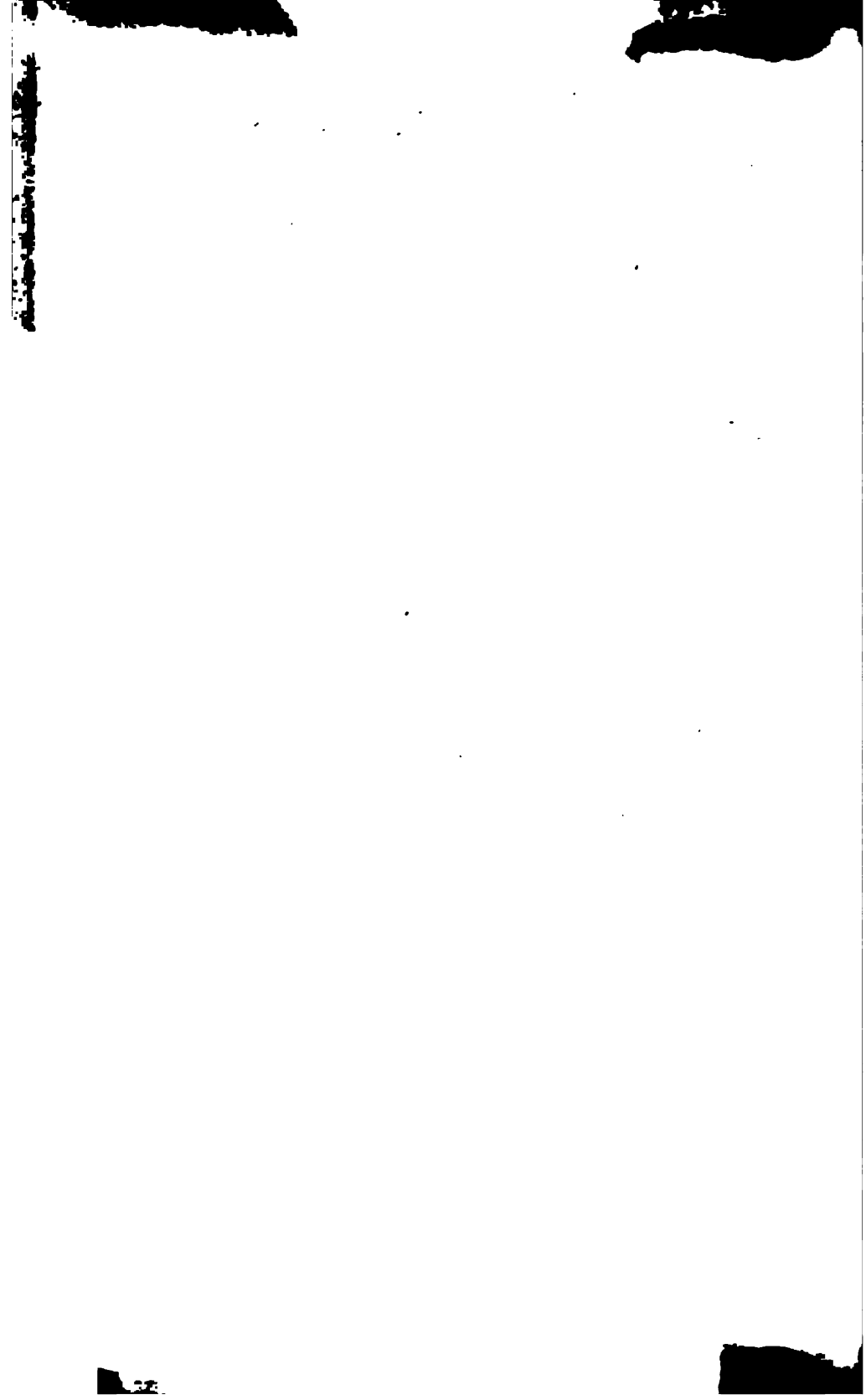
Co. Lit. 134. 2. Inf. 567.
Jo. 7. pl. 6. Hut. 43. Br.
Jour. 36. 13. E. 3. Age,
96. 17. E. 3. Age, 8.
11. E. 3. Age, 6. 12. 18.
E. 4. 17. b. 23. b. 40. 42.
43. 48. E. 3. 39. 13. 5. a.
33. b. Dy. 132.

[Booth Real Act. 92, 93.]

END OF THE SECOND PART,







Standard Law Library



3 6105 062 790 634



